Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

DORIS KAHN,

Petitioner,

v.

SMITH BARNEY, HARRIS UPHAM & CO., INC.,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court, Appellate Division,
And
The Court Of Appeals For The State Of New York

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In April 1989 Petitioner filed a NASD arbitration. In 1983 she had signed a Vantage Account Agreement (for check writing, etc.) but had not signed Smith Barney's form "Securities Account Agreement." This form had an "any controversy" arbitration clause with New York law governing the agreement "and its enforcement . . . " Smith Barney sought a judicial ruling under CPLR 7502-03 that the claims were barred by the statute of limitations. In July 1994 the New York Court of Appeals denied Smith Barney's motion to stay the arbitration; Petitioner then won her Florida arbitration. Thereafter, the Court held the Vantage Account Agreement "refers to and incorporates" the "any controversy" arbitration provision and New York law, and further held CPLR 7502-03 were incorporated via the choice-of-law clause because the parties did not provide for their exclusion. On remand, the appellate division found all claims time barred.

After *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), can a New York choice-of-law clause override an "any controversy" arbitration provision and thereby incorporate New York's statutes granting respondents a judicial proceeding to decide statute of limitations defenses?

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PETITION FOR WRIT OF CERTIORARI

Doris Kahn respectfully petitions for a writ of certiorari to review the judgment and opinion of the New York Court of Appeals entered in this cause February 21, 1995, which became final June 7, 1995, and the judgment by the Appellate Division, First Department, upon remand, dated December 4, 1997 which became final upon denial of a motion for reargument on April 16, 1998.

OPINIONS BELOW

The opinions giving rise to this Petition are: *Smith Barney, Harris Upham & Co. v. Luckie* [Kahn only], 85 N.Y. 2d 193, 623 N.Y.S. 2d 800, 647 N.E. 2d 1308 (N.Y. 1995); and upon remand, *Smith Barney, Harris Upham & Co. v. Luckie* [Kahn only], 665 N.Y.S. 2d 74 (App. Div. 1st Dept. 1997). These opinions and the orders denying reargument are reprinted in the Appendix hereto at pages 1, 20, 22 and 26.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257. This Petition seeks review of an important question of federal arbitration law decided by the New York Court of Appeals; the Court of Appeals' decision became the law of the case upon remand to the Appellate Division, which held Petitioner's claims time-barred.

The decision of the New York Court of Appeals is dated February 21, 1995 and the motion for reargument was denied June 7, 1995; upon remand, the Appellate Division, First Department, decided the matter December 4, 1997 and denied the motion for reargument by order dated April 16, 1998. Leave to appeal from the Appellate Division to the New York Court of Appeals is discretionary; Petitioner considered that such a motion for leave to appeal would be futile because on December 4, 1997 (the date of the Appellate Division's decision) the Court of Appeals decided *Smith Barney, Inc. v. Sacharow*, 666 N.Y.S. 2d 990 (N.Y.1997), which reconfirmed both the holding and rationale of that court's 1995 *Luckie* decision in Petitioner's case. *Sacharow* is found at App. 28. This Petition is filed within 90 days from rendition of the Appellate Division's denial of reargument.

STATEMENT OF THE CASE

Doris Kahn's arbitration and litigation odyssey began in April 1989.

1989-1993

Petitioner opened her Smith Barney account in December 1979. In January 1983 she signed a Vantage Account Agreement dealing with check writing, overdraft protection and an American Express card. App. 63. The Agreement provides that the "Vantage Account is a conventional Smith Barney securities margin account (the 'Securities Account') . . . " RI-90, App. 64. The Securities

Account Agreement (not signed) contains the arbitration provision:

> "*Any controversy* between Smith Barney and me arising out of or relating to this contract or the breach thereof, shall be settled by arbitration, in accordance with the rules, then obtaining, of either the . . . New York Stock Exchange, American Stock Exchange or National Association of Securities Dealers as I may elect." (Emphasis added.) RI-92, App. 71.

There were no expressed limitations on the "Any controversy" requirement (except as to federal securities claims, then not arbitrable). *Id.* The governing law paragraph of this Securities Account Agreement reads in relevant part:

> **"GOVERNING LAW**
> "This Agreement and its enforcement shall be governed by the laws of the State of New York and its provisions shall be continuous . . . " *Id.*, App. 72.

In January 1989, Petitioner discovered the mishandling of her account and on April 4, 1989, filed a demand for arbitration with the American Arbitration Association (AAA), RI-79, pursuant to the "Amex Window" provision, which provides that a customer of a member firm

> "may elect to arbitrate before the American Arbitration Association in the City of New York, unless the customer has expressly agreed, in writing, to submit only to the arbitration procedure of the Exchange." Am. Stock Exch. Const., Art. VIII, Sec. 2(c). RI-108.

Smith Barney went to court: upon its ex parte Petition and Affidavit of May 8, 1989 it obtained on May 9 a

stay order to show cause why, *inter alia*, the AAA, Doris Kahn and others should not be enjoined pursuant to CPLR 7503 and why Kahn's claims should not be dismissed as time-barred. RI-11-34. Smith Barney's Verified Petition at ¶ 21 made this statement, which has not been questioned by the courts involved in this case:

> "The Vantage Agreement refers to and incorporates by reference the Securities Account Agreement. A blank facsimile of the Securities Account Agreement which was in use at or about the time Kahn executed the Vantage Account Agreement is annexed along with the Vantage Account Agreement as Exhibit G." RI-26, App. 44.

Before Smith Barney obtained the May 9, 1989 stay, Petitioner filed on April 12, 1989 an arbitration pursuant to the NASD Code to protect her arbitration rights, and filed on May 9th (before receiving notice of the New York stay) a declaratory judgment action in the Pasco County, Florida, Circuit Court to compel arbitration before the AAA. RI-5-6. Smith Barney removed this action to federal court. RI-6. After no ruling by the New York court on the 1989 stay, the federal court in Florida on June 7, 1991 closed the Amex Window to this neutral forum. *Luckie v. Smith Barney, Harris Upham, Inc.*, 766 F. Supp. 1116 (M.D. Fla. 1991). On October 14, 1992, the New York trial court denied Smith Barney's 1989 motion to dismiss Mrs. Kahn's claims as time-barred. RI-6.

Next came *Luckie v. Smith Barney, Harris Upham & Co.*, 999 F. 2d 509, 513-14 (11th Cir. 1993), holding that a specific customer agreement superseded any nascent rights to the AAA under Amex Article VIII, Sec. 2.

Smith Barney had appealed the New York trial court decision of October 14, 1992, RI-5-16, and on November 16, 1993, the appellate court presciently wrote:

> "The parties intention to resolve all disputes by arbitration being clear, dismissal of respondent's claims pursuant to CPLR 7502(b) would defeat the policies of the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*) . . . " *Smith Barney, Harris Upham & Co. v. Luckie*, 605 N.Y.S. 2d 838 (App. Div., 1st Dept. 1993), App. 49.

1994-1998

The New York Court of Appeals granted Smith Barney "leave to appeal, but [on June 9 and July 5, 1994 had] denied its motion for a stay of [the Florida] arbitration pending resolution" (85 N.Y. 2d at 199, App. 4) of the appeal. Arbitration was held in August and September. The October 11, 1994 award reflects the arbitrators' ruling on the six-year eligibility issue under § 15 of the NASD Code, but not specifically on the statute of limitations defense (although Mrs. Kahn recovered only about half the compensatory damages sought). App. 61.

Upon receipt of the award Mrs. Kahn promptly filed in the Southern District of Florida an action to confirm the award. That court stayed the matter until the New York Court of Appeals decided its case. On February 21, 1995, the New York court made these rulings in *Smith Barney, Harris Upham & Co., Inc. v. Luckie* [Kahn only], 85 N.Y. 2d 193, 623 N.Y.S. 2d 800, 647 N.E. 2d 1308 (N.Y. 1995):

1. The Vantage Account Agreement "between Smith Barney and Kahn refers to and incorporates a Securities Account Agreement, which in turn contains an arbitration clause . . . " *Id.* at 198, App. 2.

2. The critical component of the New York choice-of-law provision was "this Agreement and its enforcement." *Id.* at 202, App. 7.

3. New York's law on arbitration was, therefore, incorporated by this choice-of-law clause unless specifically excluded: "Although the parties broadly agreed to arbitrate 'any controversy'," CPLR 7502 was part of the arbitration law of the State of New York:

> "In other words, when the parties chose to apply New York law, *'without excluding its arbitration rules'* from that general condition (*Mastrobuono v. Shearson Lehman Hutton*, 20 F. 3d 713, 717 [7th Cir. 1994], *cert. granted* ___ US ___, 115 S.Ct. 305), the parties adopted as binding New York's rule that threshold Statute of Limitations questions are for the courts." *Id.* at 202, App. 10.

The rationale for the court's decision was bottomed largely upon its reading of *Volt Information Sciences v. Leland Stanford Jr. Univ.*, 489 U.S. 468, 103 L. Ed. 488, 109 S.Ct. 1248 (1995).

Mrs. Kahn filed a motion for reargument based upon the March 6, 1995 decision by this Court in *Mastrobuono*. The motion was denied without reference to this decision on June 7, 1995. App. 20. The court remanded the matter to the appellate division. That court on August 17, 1995 granted Mrs. Kahn's earlier motion to stay pending the Florida federal court proceeding on the motion to confirm

the award. In the meantime, on May 23, 1995, the Florida district court had already entered its unreported order confirming the award. App. 50. The district court entered its final judgment on October 13, 1995. Smith Barney successfully appealed. *Kahn v. Smith Barney Shearson, Inc.*, 115 F. 3d 930 (11th Cir. 1997):

> "Since the *Luckie* decision is entitled to full faith and credit, the district court erred in confirming the arbitration award. . . . Here, we hold that the arbitrators exceeded their power in ruling on Smith Barney's limitations defenses since the New York Court of Appeals ruled that the parties, in choosing New York law, had chosen to have limitations determinations made by the court and not the arbitrators." *Id.* at 933.

In general, the court agreed with the New York court's *Volt*-based rationale.

Thereafter on September 2, 1997, the New York First Department lifted its stay and set a briefing schedule for the parties. Mrs. Kahn timely filed an "Answer Brief/ Motion to Dismiss." Mrs. Kahn moved to dismiss for lack of jurisdiction, stating there was no record evidence of an operative agreement with a New York choice-of-law clause. Mrs. Kahn also argued that § 4 of the FAA barred a court beyond the federal district where the arbitration was pending from narrowing the issues of that arbitration. In support of her § 4 argument, Mrs. Kahn relied principally upon *Merrill Lynch, Pierce, Fenner, Smith, Inc. v. Lauer*, 49 F. 3d 323 (7th Cir. 1995). Mrs. Kahn unsuccessfully sought a trial-like proceeding on the time-bar defenses. Mrs. Kahn's Answer Brief/Motion to Dismiss

closed with six prayers for relief, including, "Alternatively, an order remanding this cause to the trial court for trial on the time-bar merits" in New York City. App. 80. By memorandum decision dated December 4, 1997 the First Department held all claims time-barred. *Smith Barney, Harris Upham & Co. v. Luckie*, 665 N.Y.S. 2d 74 (App. Div. 1st Dept. 1997). App. 22. Thus, Petitioner was subjected to the CPLR proceeding as required by New York law.

Mrs. Kahn filed a motion for reargument, repeating the challenge to application of New York law and to jurisdiction by reason of § 4 of the FAA. Doris Kahn's affidavit, attached to the motion for reargument, had outlined the factual basis for tolling any and all statutes of limitations. App. 100. The affidavit basically recited that when her then Smith Barney broker, John Babitskas, moved to Dean Witter, he took her account with him in August 1984; that he was her broker until he left Dean Witter in late 1988, at which point she asked a family member to look over her investments and give her advice. By order dated April 16, 1998 the First Department denied the motion for reargument without opinion. App. 26.

Petitioner did not seek discretionary leave to appeal to the New York Court of Appeals because that court foreclosed the issue when it decided *Smith Barney Shearson, Inc. v. Sacharow*, 666 N.Y.S. 2d 990 (N.Y.1997), on the same day the First Department decision came down, to wit, on December 4, 1997. By that decision New York joined with those courts holding that arbitrators should decide all SRO six-year eligibility issues. The *Sacharow*

holding on the eligibility issue was based upon *Mastrobuono*, and its analysis was straightforward. But the court of course was constrained to distinguish its 1995 decision in *Luckie* (Doris Kahn's case). On the one hand the court said,

> " . . . *Luckie* . . . was not projected as a preclusion against parties freely contracting to submit every part of their disputes to arbitration . . . " *Id.* at 994, App. 38.

But of course no party can improve upon "any controversy" to encompass every part of a dispute. At another place the court noted that

> " . . . the drafters of these agreements include the investment houses through their customarily uniform industry standards and forms, and they can adequately protect their interests with specificity of inclusion and exclusion."[1]

Id. at 993-994, App. 36.

But Petitioner Kahn's arbitration provision lacks even the barest reference to CPLR 7502 and/or its practical effect: *Luckie* and *Sacharow* have made these CPLR sections universally included (without notice) in all New York agreements calling for arbitration of "any controversy." There is no hint in *Luckie* or *Sacharow* at how a party signing such form agreements would know about the *implied* inclusion of the CPLR provisions; and that is where the trouble lies:

---

[1] The decision makes no reference to the interests of the investing public under the Exchange Act and the Arbitration Act.

> "Furthermore, the Court [in *Luckie*] very significantly demarcated that '[c]learly, under New York law, *statutory* time limitations questions such as those presented on these two appeals – as opposed to *contractual* time limitations agreed upon by the parties – are for the courts, not the arbitrators' . . . " *Id.* at 995, App. 39. (Original emphasis.)

Choice-of-law clauses – particularly a New York clause – seem destined to cause difficulties for customers, most of whom live beyond the bound of the Empire State. Yet we must assume these clauses are enforceable (at least in breach of contract actions). But in the context of the FAA they should be drawn

> " . . . in a readily comprehensible fashion. . . . [and] they should clarify rather than obfuscate." *Merrill Lynch, Pierce, Fenner & Smith v. Lauer*, 49 F. 3d 323, 324 (7th Cir. 1995).

With this *Sacharow* reprise Mrs. Kahn knew the New York leg of her odyssey had come to an end.

REASONS FOR GRANTING THE WRIT

The New York Court of Appeals Construed an "Any Controversy" Arbitration Agreement with a New York Choice-of-Law Provision; the Agreement Offered No Clue that Petitioner Could be Subjected to Summary Judicial Proceedings on Smith Barney's Statute of Limitations Defenses.

The Court Reversed the Usual Presumption Under the FAA, Holding that CPLR 7502 was Part of the Agreement Because the Parties Did Not Specifically Exclude Its Application.

In 1997 the Court Reaffirmed this Rationale in *Sacharow*, Serving Notice that it Has No Plans to Recant Its Reading of *Volt*; Therefore, This Incorporation-by-Reference Interpretation Governs Broad-Based New York Arbitration Contracts in Every Field of Endeavor, Commercial and Consumer.

New York State is home to nearly all the major brokerage firms. These firms universally employ broad-based arbitration agreements with New York choice-of-law provisions. But *Luckie* and *Sacharow* reach far beyond retail securities contracts. Every New York manufacturer, vendor or service provider certainly can and will use such arbitration minefields to hale claimants into state courts, thereby destroying arbitration's economy of time and expense. *Luckie* and *Sacharow* delivered a new weapon to all arbitration respondents, particularly those defending against parties who cannot remove the CPLR action to federal court. This holding in *Luckie* is unambiguous; it will not contract with time:

> " . . . [W]hen the parties choose to apply New York law, *'without excluding its arbitration rules'* [*i.e.*, statutes] from that general condition . . . the parties adopted as binding New York's rule that threshold Statute of Limitations questions are for the courts." App. 10, 85 N.Y. 2d at 202. (Emphasis added.)

The "parties" referred to by the court are not just investors; the reference includes every party – in every endeavor – who signs a form agreement with an "any controversy" arbitration provision and a New York choice-of-law clause.

The Court of Appeals attached a critical importance to the New York choice-of-law provision because of the phrase, *"and its enforcement." Id.* But the importance of choice-of-law clauses almost always arises in an arbitration or litigation context. This phrase would seem to do no more than flag the application of New York law in such contexts. Adding "and its enforcement" is tantamount to writing, "New York law will govern this agreement, and we really mean to apply it." This "enforcement" qualification should not support reversal of the Arbitration Act's presumptions governing the inclusive scope of an "any controversy" agreement. The court reads the arbitration provision as if it contained these underscored words:

> "All controversies will be arbitrated, *except that statute of limitations defenses may at Smith Barney's option be brought before a court under CPLR 7502-03."*

The above language is not ambiguous, but it is not the language the court interpreted.

As previously stated, the court denied Petitioner's motion for rehearing based on *Mastrobuono*, decided 13 days after *Luckie*. In 1997, the New York Court of Appeals emphatically reaffirmed the *Luckie* rationale in *Smith Barney Shearson, Inc. v. Sacharow, supra*, holding that § 15 of the NASD code (a six-year eligibility limitation) was but a *contract provision* to be decided by the arbitrators, not the courts. Much of *Sacharow* attempts to distinguish Petitioner's case in *Luckie*. The court even says that

> " . . . *Luckie* was *narrowly tailored to the specific framework presented by that case* and was not projected as a preclusion against parties freely contracting to submit every part of their disputes to arbitration . . . " (Emphasis added.) App. 38, 666 N.Y.S. 2d at 994.

But just the *opposite* would seem to be true: *Sacharow* involved an industry rule or contract limitation, namely, § 15 of the NASD Code. Surely this is a more "narrowly tailored . . . framework" than that presented by Petitioner's case in *Luckie*: for it is *Luckie* that can now be applied to *every* arbitration contract with a New York choice-of-law clause. What the court in *Sacharow* does not allude to is that under its ruling arbitrators can decide the six-year eligibility question, but the respondents still can go to court on the statutory limitations questions, usually involving periods less than six years. Thus, *Luckie* hands all respondents the option of summary court proceedings. In other words, not a single "any controversy" agreement is exempt from *Luckie* if it also has a New York choice-of-law clause. *Sacharow* does not represent a turn in the road.

Luckie and *Sacharow* simply cannot be equated with similar rulings that might have emanated from, say, Idaho or South Dakota. These are far reaching pronouncements of the New York court's determination to uphold that State's statutes aimed specifically at arbitration, statutes that by any reasonable test should be deemed preempted by the FAA in all cases involving commerce.

Petitioner's case on remand was decided the same day as *Sacharow*. Whether or not the First Department coordinated the release of its opinion with that in *Sacharow* is not important, for that decision could only be read as a caveat to the appellate division that *Mastrobuono* should not be used upon remand to draw into question the 1995 *Luckie* decision.

Luckie is inimical to the Arbitration Act because it reverses the presumption so forcefully mandated by decisions of this Court and the lower federal courts. *E.g., Moses H. Cohen Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 74 L. Ed. 2d 765, 103 S.Ct. 927 (1983):

> "The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself *or an allegation of waiver, delay, or a like defense to arbitrability.*" 460 U.S. at 24-25. (Emphasis added.)

The logic and continuing viability of this presumption was carefully explained in *First Options v. Chicago, Inc. v. Kaplan*, 514 U.S. 938, 131 L. Ed. 2d 985, 115 S.Ct. 1920 (1995). An "any controversy" provision certainly tells a court that "the parties likely gave at least some thought

to the scope of arbitration." 514 U.S. at 945. Justice Breyer continued,

> "And, given the law's permissive policies in respect to arbitration, see, e.g., Mitsubishi Motors, supra, at 626, 105 S.Ct., at 3353, one can understand why the law would insist upon clarity before concluding that the parties did not want to arbitrate a related matter." *Id.*

The incorporation by reference via the New York choice-of-law clause hardly constitutes clarity.

Smith Barney drafted both documents and as such any ambiguity is construed most strongly against it. See *Mastrobuono*, 514 U.S. at 62-63. Although this is only a common law principle of contract construction, reversal of this principle collides with accepted FAA principles of contract construction.

Both *Luckie* and *Sacharow* read too much into *Volt*, eschewing the proper reading of this case set out in *Mastrobuono*:

> "At most, the choice-of-law clause introduces an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards [and arbitration of defenses to all claims]. As we pointed out in *Volt*, when a court interprets such provisions in an agreement covered by the FAA, 'due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.' " *Id.* at 62.

And see *id.* at 61, 62, nn.7-8. It is respectfully submitted that customary deference to a state court interpretation of

a garden variety choice-of-law clause cannot justify creation of a presumption that can trump these FAA-based presumptions. "Respondents drafted an ambiguous document, and they cannot now claim the benefit of the doubt." *Id.* at 63.

Moreover, *Luckie* cannot be distinguished from *Doctor's Assoc's, Inc. v. Casarotto*, 517 U.S. 681, 134 L. Ed. 2d 902, 116 S.Ct. 1652 (1996); and *Southland Corp. v. Keating*, 465 U.S. 1, 79 L. Ed. 2d 1, 104 S.Ct. 852 (1984). New York's CPLR 7502-03 applies only to arbitration contracts. See these sections at App. 57-58. In both *Doctor's Assoc's* and *Southland*, a statute not described or even referenced in the broad arbitration provision worked to thwart what would otherwise be fully arbitrable claims. Montana's first-page notice requirement for arbitration provisions was held enforceable by the Montana court's misreading of *Volt*. This Court reversed the judgment:

> "The state rule examined in *Volt* determined only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself." 517 U.S. at 688.

New York's CPLR 7502-03 should not receive more favorable treatment merely because these sections sometimes only hinder without blocking all arbitration proceedings by an ill-defined judicial proceeding on statute of limitations issues followed by the inevitable appeals and delays. These statutes certainly "affect the enforceability of the arbitration agreement itself." *Id.*

This Court's contract analysis in *Mastrobuono* now must surely represent *federal law*, no matter if the contract was initially construed by a state or a federal court, if the

issue is whether an undisclosed statute or rule prevents arbitration or materially impinges on a claim otherwise fully arbitrable under an "any controversy" provision:

> "We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other." 514 U.S. at 63-64.

Luckie and *Sacharow* are also at odds with *PaineWebber, Inc. v. Elahi*, 87 F. 3d 589 (1st Cir. 1996); and *PaineWebber, Inc.v. Bybyk*, 81 F. 3d 1193 (2d Cir. 1996).

While industry-sponsored arbitration leaves much to be desired from the investor's viewpoint, the judicial proceedings in the case at bar demonstrate the time, expense and inequities inherent in the bifurcated system now called for under a New York choice-of-law clause.

CONCLUSION

Luckie and *Sacharow* are not self-correcting, one-time deviations from what had been the inexorable march of federal arbitration law bearing upon broad-based arbitration provisions containing choice-of-law clauses. It is respectfully submitted that the writ should be granted because the construction adopted in *Luckie* and forcefully reaffirmed in *Sacharow* presents a major barrier to the uniform application of the Federal Arbitration Act in

every commercial and consumer enterprise governed by broad-based arbitration provisions with a New York choice-of-law clause.

Respectfully submitted,

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85 N.Y. 2d 193, 647 N.E.2d 1308, 623 N.Y.S.2d 800
MTR OF SMITH BARNEY v. LUCKIE [85 NY2d 193]
Statement of Case

[___ NE2d ___, ___ NYS2d ___]

In the Matter of SMITH BARNEY, HARRIS UPHAM & CO., INC.,
Appellant, v CHARLIE LUCKIE, JR., et al.,
Respondents, and DORIS KAHN, Respondent.

In the Matter of MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., et al., Appellants, v. MARGARET B. MANHARD, Respondent.

Argued January 4, 1995; decided February 21, 1995

OPINION OF THE COURT

TITONE, J.

These two appeals arise from controversies concerning separate securities transactions undertaken by two securities brokers on behalf of two unrelated investors. The common issue presented is whether the Appellate Division in each case properly held that the timeliness of claims sought to be arbitrated pursuant to an agreement governed by the Federal Arbitration Act (FAA) is a question reserved to the arbitrators, notwithstanding the facts that each arbitration agreement contained a New York choice of law provision, and that, under New York law, Statute of Limitations questions are properly resolved by the courts (*see*, CPLR 7502[b]). In light of the United States Supreme Court's decision in *Volt Information Sciences v. Leland Stanford Jr. Univ.*, 489 (US 468), we conclude that a determination by the court on the Statute of Limitations question offends neither the language of the FAA nor its underlying policies where

the parties have mutually agreed that New York law shall govern the dispute. Accordingly, we reverse in each case and remit to the Appellate Division for a determination on the previously unaddressed Statute of Limitations questions.

I

Smith Barney

In 1989, respondent Doris Kahn commenced arbitration against petitioner Smith Barney, Harris Upham & Co.,[1] a national securities broker-dealer having its principal executive offices in New York, alleging Federal and State claims of fraudulent and unsuitable sale of certain securities. Kahn, a Florida resident, made her Smith Barney investments exclusively through petitioner's Florida offices, and terminated her account with petitioner in or about August 1984.

The governing customer agreement between Smith Barney and Kahn refers to and incorporates a Securities Account Agreement, which in turn contains an arbitration clause. The parties' arbitration clause provides that "[a]ny controversy between Smith Barney and [Kahn] arising out of or relating to this contract or the breach thereof shall be settled by arbitration" and specifies the available arbitration fora. The arbitration clause is directly followed in the Securities Account Agreement by a New York choice of law provision, which states that "[t]his agreement and its enforcement shall be governed by the laws of the State of New York."

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[1] Petitioner is now known as Smith Barney, Inc.

The parties subsequently engaged in extensive State and Federal litigation to determine both the appropriate forum for arbitrating their dispute (*see, Luckie v. Smith Barney, Harris Upham & Co.*, 766 F.Supp. 1116 [M.D.Fla.1991], *affd.* 999 F.2d 509) and whether the arbitration is barred by the Statute of Limitations. In 1989, by special proceeding, petitioner Smith Barney sought an order in New York Supreme Court staying the arbitration before the National Association of Securities Dealers (NASD)[2] pursuant to CPLR 7503 and moved to dismiss Kahn's claims pursuant to CPLR 7502(b) on the ground, among others, that they were time-barred. Supreme Court granted a temporary stay of arbitration pending determination of the petition. The court ultimately denied the petition for a stay, ruling that Kahn's claims were governed by New York's six-year Statute of Limitations for fraud, and were timely filed. The Appellate Division affirmed the denial of the stay of arbitration on different grounds. The Court ruled that the Statute of Limitations question is one to be resolved by the arbitrators rather than the courts. Relying on the fact that "[t]he parties' intention to resolve all disputes by arbitration [was] clear," the Court reasoned that "dismissal of respondent's claims pursuant to CPLR 7502(b) would defeat the policies of the Federal Arbitration Act." (198 A.D.2d 87.) Thus, the Court concluded that "the arbitrators should decide the Statute

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[2] As directed by the 11th Circuit Court of Appeals, respondent pursued her arbitration claims before the NASD (*see, Luckie v. Smith Barney, Harris Upham & Co.*, 999 F2d 509 [11th Cir. 1993], *supra*). Arbitration was held in the fall of 1994, and respondent was awarded $360,098.62 plus costs.

of Limitations issue, including whether New York or Florida law applies" (*id.*, at 87). This Court granted Smith Barney's motion for leave to appeal, but denied its motion for a stay of arbitration pending resolution of this appeal.

Merrill Lynch

In August 1992, respondent Margaret B. Manhard filed a claim in arbitration before the NASD in New York against petitioners Merrill Lynch, Pierce, Fenner & Smith, Inc., a national securities broker-dealer having its principal place of business in New York, and John R. DaCamara, a Merrill Lynch employee. Manhard alleged various Federal and State claims against petitioners arising out of certain investments made by Merrill Lynch on her behalf.

Arbitration was commenced in accordance with the terms of a customer agreement Manhard executed with Merrill Lynch. As in *Smith Barney*, the agreement provided that any controversy arising from the contract shall be settled by arbitration, and included a choice of law provision stating that "[t]his agreement and its enforcement shall be governed by the laws of the State of New York."

On October 1, 1992, petitioners commenced this special proceeding in Supreme Court to permanently stay arbitration pursuant to CPLR 7502 and 7503(b). Supreme Court granted petitioners a temporary stay of the arbitration pending a hearing on the petition. The petition contained allegations that all of Manhard's claims were either ineligible for submission to arbitration

under NASD Code of Arbitration Procedure § 15 – which precludes arbitration of claims based on transactions occurring more than six years prior to commencement of the arbitration – or were time-barred by applicable Federal or State Statutes of Limitations. Petitioners also argued that New York's borrowing statute – CPLR 202[3] – required that the shorter of either New York's or Virginia's Statutes of Limitation applied. Thereafter, Manhard's counsel conceded that all claims based upon transactions in her account that occurred more than six years prior to commencement of the arbitration were ineligible for arbitration, but maintained that the timeliness of her remaining claims was an issue reserved for the arbitrators. Manhard additionally argued that the New York borrowing statute was not an available bar to her claims because they "accrued" not in Virginia, the place of economic injury, but in New York, where the claim for arbitration was filed.

Supreme Court granted the petition and permanently stayed the arbitration. The Court ruled that pursuant to New York law, the Court was the proper forum to decide whether the claims were time-barred from arbitration. The Court then determined that New York's borrowing statute applied, found that Manhard's claims accrued in

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[3] CPLR 202 provides: "An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply."

Virginia – the place of her economic loss – and held that the remaining claims were all time-barred.

The Appellate Division affirmed so much of Supreme Court's order holding that claims based on transactions occurring more than six years prior to the filing were ineligible for arbitration pursuant to NASD rules and should be permanently stayed. However, the Court reversed on the Statute of Limitations issue, holding that because the parties made clear their intent to resolve all disputes by arbitration, "the policy of the Federal Arbitration Act requires that the applicability of a statute of limitations be decided by the arbitrators." (201 A.D.2d 347.) We granted Merrill Lynch's motion for leave to appeal, and granted its motion for a temporary stay of the Appellate Division order pending resolution of the appeal.

II

The Federal Arbitration Act (9 U.S.C. §§ 1-16) specifies that a written provision to arbitrate any controversy arising out of a "contract evidencing a transaction involving commerce" is valid and enforceable (*see*, 9 U.S.C. § 2).[4] The Act was designed to terminate

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[4] Section 2 of the FAA, entitled "Validity, irrevocability, and enforcement of agreements to arbitrate," provides: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction,

"the judiciary's longstanding refusal to enforce agreements to arbitrate" (*Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 219-220). In enacting the FAA, Congress established a Federal policy favoring arbitration agreements, which is to be advanced by rigorous judicial enforcement of arbitration agreements (*Shearson/American Express v. McMahon*, 482 U.S. 220) and by resolution of any "ambiguities as to the scope of the arbitration clause itself . . . in favor of arbitration" (*Volt Information Sciences v. Leland Stanford Jr. Univ.*, 489 U.S. 468, 476, *supra*; *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24).

Notwithstanding the Federal policy favoring liberal enforcement of agreements to arbitrate, the FAA should not be construed to "confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in [the parties'] agreement*' " (*Volt Information Sciences v. Leland Stanford Jr. Univ.*, 489 U.S., at 474-475, *supra*, quoting 9 U.S.C. § 4 [emphasis added by Supreme Court]). In other words, in recognition of the fact that arbitration is manifestly a matter of contract, and that parties to an arbitration agreement – like all contracting parties – are free to select the terms under which they will arbitrate, the policy established by the FAA is to ensure that private agreements to arbitrate are enforced according to their terms (*id.*, at 476). Accordingly, the parties are at liberty to include a choice of law provision in their agreement, and the parties'

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or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for their revocation of any contract."

choice will be honored unless the chosen law creates a conflict with the terms of, or policies underlying, the FAA (*id.*).

The parties to each of the appeals before us do not dispute that the customer agreements governing the securities transactions at issue are contracts "involving commerce"[5] within the realm of the FAA (*see, Corey v. New York Stock Exch.*, 493 F.Supp. 51, *affd* 691 F.2d 1205, 1210 [6th Cir.1982]). The question we must resolve is whether New York arbitration law conflicts with the FAA on the question of the arbitrability of these Statute of Limitations disputes such that its application must be preempted.

Generally, under New York statutory and case law, a court may address three threshold questions on a motion to compel or to stay arbitration: (1) whether the parties made a valid agreement to arbitrate; (2) if so, whether the agreement has been complied with; and (3) whether the claim sought to be arbitrated would be time-barred if it were asserted in State court (*see*, CPLR 7502[b]; 7503; *Matter of County of Rockland [Primiano Constr. Co.]*, 51 N.Y.2d 1, 9, n. 2). Clearly, under New York law, *statutory* time limitations questions such as those presented on these two appeals – as opposed to *contractual* time

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[5] The commercial transactions subject to the FAA's dictates are defined in section 1 of that Act as: "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation". (9 USC § 1.)

limitations agreed upon by the parties – are for the courts, not the arbitrators (*see, Rockland*, 51 N.Y.2d, at 9, *supra*).

Undeniably, in the absence of an explicit choice of law provision, governing Federal law would have precluded the courts in the appeals before us from addressing the Statute of Limitations issue (*see, Conticommodity Servs. v. Philipp & Lion*, 613 F.2d 1222, 1224-1225 [2d Cir.1980]) or from issuing stays under our arbitration act (*see, Matter of Rederi [Dow Chem. Co.]*, 25 N.Y.2d 576, 585). However, the parties' choice that New York law would govern "the agreement *and its enforcement*" (emphasis added) indicates their "intention to arbitrate to the extent allowed by [this State's] law," even if application of the State law – and an adverse ruling on a Statute of Limitations claim – would relieve the parties of their responsibility under the contract to arbitrate (*Armco Steel Co. v. CSX Corp.*, 790 F.Supp. 311, 318 [D.D.C.1991]; *see also, Saturn Distrib. Corp. v. Williams*, 905 F.2d 719 [4th Cir.1990] [parties are entitled to incorporate State law restrictions into their arbitration agreement that would otherwise be preempted by the FAA], *cert. denied* 498 U.S. 983; *Flight Sys. v. Laurence Co.*, 715 F.Supp. 1125 [D.D.C.1989]). Although the parties broadly agreed to arbitrate "any controversy" arising from the customer agreements, that clause – like all other provisions in the contract – was subject to the parties' additional qualification that New York State law provides the basis of decision for questions concerning not only the agreement, but more critically, its enforcement. Accordingly, we conclude that under this agreement the parties agreed to refer questions of timeliness to the

courts by incorporating New York law. In other words, when the parties chose to apply New York law, "without excluding its arbitration rules" from that general condition (*Mastrobuono v. Shearson Lehman Hutton*, 20 F.3d 713, 717 [7th Cir.1994], *cert. granted* ___ US ___, 115 S. Ct. 305), the parties adopted as binding New York's rule that threshold Statute of Limitations questions are for the courts.

In light of our conclusion that the parties intended that New York law govern the arbitration, the dispositive question for resolution of these appeals becomes whether, under standard Federal preemption analysis, the Federal Arbitration Act's compulsory arbitration provisions and its underlying policies require that even those questions normally reserved to the courts pursuant to New York law must be resolved by the arbitrators, notwithstanding the presence of a New York choice of law provision in the agreement to arbitrate.

First, the provisions of CPLR 7502(b)[6] and 7503[7] authorizing the courts to consider a time limitation

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[6] CPLR 7502(b), entitled "Limitation of time", provides: "If, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court * * * . The failure to assert such bar by such application shall not preclude its assertion before the arbitrators, who may, in their sole discretion, apply or not apply the bar."

[7] CPLR 7503(a), entitled "Application to compel arbitration; stay of action", provides: "A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question

asserted as a bar to arbitration in connection with an application to compel or stay arbitration do not expressly conflict with any provision of the FAA (*see*, 9 U.S.C. §§ 1-16).[8] Additionally, Congress did not intend "to occupy the entire field of arbitration" in enacting this statutory scheme (*Volt Information Sciences v. Leland Stanford Jr. Univ.*, 489 U.S. 468, 477, *supra*). In the absence of any express conflict between the provisions of the FAA and New York's arbitration law or some express congressional intent to occupy the entire field of arbitration in commercial disputes, the FAA will be found

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whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration."

[8] FAA § 3 provides for a judicial stay of court proceedings "brought in any of the courts of the United States" where an issue raised therein is referable to arbitration. Additionally, section 4 of the Act authorizes "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court * * * for an order directing that such arbitration proceed *in the manner provided for in such agreement*" (9 USC § 4 [emphasis supplied]). These sections generally provide tools to enforce arbitration agreements and do not purport to circumscribe the issues that a State court may consider in staying or compelling arbitration where the parties' agreement contemplates that its enforcement will be governed by the law of a particular State.

to preempt State law only to the extent that the State law " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' " (*id.*, at 477, *quoting Hines v. Davidowitz*, 312 U.S. 52, 67). Accordingly, the dispositive inquiry before us is whether application of New York arbitration law in this context "undermine[s] the goals and policies of the FAA" (*Volt Information Sciences, supra*, at 478). We conclude that it does not.

Our point of departure on this aspect of the preemption analysis is the United States Supreme Court's decision in *Volt Information Sciences v. Leland Stanford Jr. Univ.*, (489 U.S. 468, *supra*). In *Volt*, the Supreme Court held that a California statute permitting a court to stay arbitration pending resolution of related litigation was not preempted by the FAA where the parties included a clause in their arbitration agreement stating that the agreement will be governed by California law. The Court first concluded that it would not disturb the California Court of Appeal's conclusion that the parties had incorporated California's arbitration rules into their agreement, since the interpretation of a private contract is "ordinarily a question of state law" (*id.*, at 474). The Court next concluded that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate" (*id.*, at 476). The Court went on to note that "[i]nterpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration – rules which are manifestly designed to encourage resort to the arbitral process – simply does not

offend the rule of liberal construction set forth in *Moses H. Cone* [460 U.S. 1, *supra*], nor does it offend any other policy embodied in the FAA" (*id.*, at 476).

Turning its focus to preemption, the Supreme Court addressed whether the State law, which authorized a stay of arbitration where no Federal counterpart was available, created a conflict with Federal law which "would undermine the goals and policies of the FAA" (*id.*, at 478). Concluding that it would not, the Court reasoned that the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms" (*id.*, at 478). Applying ordinary contract principles, the Court concluded that parties are not only free to limit by agreement the issues to be arbitrated, but also to "specify by contract the rules under which that arbitration will be conducted" (*id.*, at 479). Finally, in key language, the Court explained that where "the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, *even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward*" (*id.*, at 479 [emphasis added]).

In the aftermath of *Volt*, the courts have divided on whether New York's rule permitting the court to address a statute of limitations question conflicts with the compulsory arbitration provisions of the FAA and is thus preempted (*compare, Chemical Futures & Options v. Resolution Trust Corp.*, 832 F.Supp. 1188, 1194 [N.D.Ill.1993] [New York choice-of-law clause in arbitration agreement makes State arbitration rules applicable; under New York law, courts, not arbitrators,

decide Statute of Limitations questions]; *Seaboard Sur. Co. v. Cates*, 604 So.2d 570 [Fla.Dist.Ct.App.1992] [same], *with Merrill Lynch, Pierce, Fenner & Smith v. Shaddock*, 822 F.Supp. 125 [S.D.N.Y.1993] [time-bar defenses are for arbitrators, despite New York choice of law clause]; *Merrill Lynch, Pierce, Fenner & Smith v. Gregg*, 1993 WL 616691 [U.S.Dist.Ct., M.D.Fla.1993] [same]; *Victor v. Dean Witter Reynolds*, 606 So.2d 681 [Fla.Dist.Ct.App., 5th Dist., 1992] [same], *review denied* 614 So.2d 502 [Fla.1993]). Those courts opting for preemption generally rely on *Shearson Lehman Hutton v. Wagoner*, 944 F.2d 114 [1991]. We are not persuaded by the *Wagoner* court's analysis, however, which did not cite or address the significance of the previously decided *Volt* case, and instead relied on two pre-*Volt* precedents which, critically, lack any reference to a contractual choice of law provision (*Conticommodity Servs. v. Philipp & Lion*, 613 F.2d 1222, 1224-1225 [2d Cir.1980], *supra; Reconstruction Fin. Corp. v. Harrisons & Crosfield*, 204 F.2d 366 [2d Cir.], *cert. denied* 346 U.S. 854 [1953]). Indeed, one of those cases, *Conticommodity*, involved the very different situation where the time limitation was contained within the body of the contract – a matter for the arbitrator even under New York law (*see, Matter of County of Rockland [Primiano Constr. Co.]*, 51 N.Y.2d 1, *supra*).

In contrast to *Wagoner* and its progeny, we conclude that this State's body of arbitration law – including the rule that courts may consider threshold Statute of Limitations claims – is not inimical to the policies of the FAA. Significantly, the FAA was modeled after New York's arbitration law (*see, Prima Paint v. Flood & Conklin*, 388 U.S. 395, 405, n. 13; *Matter of Weinrott* [*Carp*], 32

N.Y.2d 190, 198-199). Accordingly, no significant distinction can be drawn between the policies supporting the FAA and the arbitration provisions of the CPLR. New York's rule permitting the courts to address Statute of Limitations defenses to arbitration where the parties so choose in no way interferes with the parties' contractual freedom to choose arbitration or even to choose arbitration "under applicable state rules" – the overarching goal of the FAA (*Empire Blue Cross & Blue Shield v. Greeson's A Place for Us*, 985 F.2d 459, 462 [9th Cir.1993]). In fact, by honoring the parties' selection of New York law to govern their agreement and its enforcement, our holding advances the Federal policy of "ensur[ing] the enforceability according to their terms, of private agreements to arbitrate" (*Volt*, 489 U.S., at 476, *supra*).

Both sets of petitioners attempt to distinguish *Volt* on the grounds that the California law at issue there merely permitted imposition of a temporary stay of the arbitration, while an adverse ruling on the Statute of Limitations issue by the courts in these cases would result in a permanent stay of arbitration. That interpretation of the Supreme Court precedent is belied by the unqualified conclusion reached by the Court that enforcing state rules of arbitration "according to the terms of the agreement is fully consistent with the goals of the FAA, *even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward*" (*id.*, at 479). Contrary to petitioners' position, the Supreme Court did not rest its decision on the fact that the Court-issued stay in *Volt* was only temporary. Indeed, the Court consistently referred to the entire body of California's

statutory arbitration rules, and concluded without circumscription that "state rules of arbitration" may be incorporated into an agreement to arbitrate without offending the policies underlying the FAA (*id.*, at 479). Accordingly, the potential permanency of the stay granted pursuant to New York law does not alter our conclusion that application of New York law to permit court determination of statutory timeliness issues does not conflict with the underlying policies of the FAA.

III

When making a threshold Statute of Limitations determination under New York law, the courts must apply the same period of limitations in arbitration that would govern if an action were brought on the claim being arbitrated (Matter of SCM Corp. [Fisher Park Lane Co.], 40 N.Y.2d 788, 390 N.Y.S.2d 398, 358 N.E.2d 1024). Under the New York borrowing statute (CPLR 202), a securities fraud claim arising outside this State is subject to the limitations periods of the jurisdictions where the injury occurred – generally, the place where the investors resided and sustained the economic impact of the loss (see, *Dymm v. Cahill*, 730 F.Supp. 1245 [S.D.N.Y.1990]). In borrowing the foreign statute, "[a]ll the extensions and tolls applied in the foreign state must be imported with the foreign statutory period, so that the entire foreign statute of limitations * * * applie[s], and not merely its period" (McLaughlin, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C202:3, at 109 [emphasis in original]). Since the Appellate Division in each case before us did not address the Statute of limitations arguments, including applicability

of the borrowing statute relevant accrual dates, tolls and extensions by virtue of each panel's conclusion that the question was for the arbitrators, we remit in each case for such a determination.

Accordingly, in each case, the order of the Appellate Division should be reversed, with costs, and each case remitted to the Appellate Division, First Department, for further proceedings in accordance with this opinion.

KAYE, Chief Judge (concurring).

I concur in the Court's opinion and conclusion that because the form arbitration agreements at issue plainly provide that New York law governs the "agreement and its enforcement" (emphasis added), the parties can fairly be understood to have agreed that all of New York arbitration law (including the provisions of CPLR article 75 which allow a party to first litigate Statute of Limitations issues in court) would apply. I write separately, however, to make two somewhat related points concerning what I fear may be the continuing erosion of the pro-arbitration policy originally expressed by Congress in the Federal Arbitration Act (FAA).

First, I remain troubled by the practical effect for respondents – residents of the States of Florida and Virginia – who now have to litigate the brokerage firms' Statute of Limitations defenses in New York State court before ever reaching the arbitrators' door. Because of the Supreme Court's direction in *Volt Information Sciences v. Leland Stanford Jr. Univ.*, #208 489 U.S. 468, 479, 109 S.Ct. 1248, 1256, 103 L.Ed.2d 488 that "private agreements to arbitrate [be] enforced according to their terms," and the

explicit terms of the agreements before us, however, I feel compelled to join the Court in reversing here.

Second, I think it useful to underscore the distinctly different interpretive choices made by the Court in this case and in *Salvano v. Merrill Lynch, Pierce, Fenner & Smith*, 85 N.Y.2d, 173, 623 N.Y.S.2d 790, 647 N.E.2d 1298 [decided today].

In the present case, the Court concludes that the express language of the parties' agreements contemplated that the whole of New York arbitration law would apply, and following *Volt* we give force to the parties' agreement. In *Salvano*, by contrast, the arbitration agreements and New York Stock Exchange rules are silent as to the availability of expedited arbitration. Nonetheless, the majority concludes that the parties, by their silence, implicitly agreed that an expedited process was not permissible and thus, the Court lacked the authority to expedite the arbitration. As my dissent reflects, since the applicable agreements and rules in *Salvano* were silent as to the issue of expedition, it is incumbent upon the Court to vindicate the underlying policy of the FAA and affirm the issuance of an order expediting the arbitration during the pendency of the preliminary injunctions.

The difference between my vote to reverse in the present case and my dissenting vote to affirm in *Salvano* thus results from the difference between the agreements themselves.

KAYE, C.J., and SIMONS, BELLACOSA, SMITH and CIPARICK, JJ., concur with TITONE, J.

KAYE, J., concurs in a separate concurring opinion; Judge LEVINE taking no part.

In each case: Order reversed, etc.

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventh *day of* June 1995

Present, HON. JUDITH S. KAYE,
Chief Judge, presiding.

Mo. No. 428

In the Matter of Smith Barney, Harris Upham & Co., Inc.,

Appellant,

v.

Charlie Luckie, Jr., et al., and Doris Kahn,

Respondents.

In the Matter of Merrill Lynch, Pierce, Fenner & Smith, Inc., et al.,

Appellants,

v.

Margaret B. Manhard,

Respondent.

A motion for reargument to the Court of Appeals in the above causes having been heretofore made upon the part of the respondents Kahn and Manhard herein, papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Judge Levine took no part.

/s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

665 N.Y.S.2d 74 (A.D. 1 Dept 1997)

SMITH BARNEY, HARRIS UPHAM & CO. INCORPORATED,
Petitioner-Appellant,

v.

Charlie LUCKIE, Jr., et al., Respondents,

and

Doris Kahn, Respondent-Respondent.

Supreme Court, Appellate Division,
First Department,

Dec. 4, 1997.

Paul K. Barennoltz for Petitioner-Appellant.

Respondent-Respondent, Pro Se.

Before MURPHY, PJ., and ELLERIN, WALLACH and NARDELLI, JJ.

MEMORANDUM DECISION.

Upon remittitur from the Court of Appeals, order of the Supreme Court, New York County (Norman Ryp, J.), entered October 23, 1992, which denied appellant's petition to stay arbitration, unanimously reversed, on the law, without costs, the petition granted, respondent's claims dismissed and arbitration permanently stayed.

As is here relevant, petitioner sought to stay arbitration of respondents' claims upon the ground that the claims had not been timely interposed. Supreme Court denied the petition, holding that respondents' claims

were in fact timely under New York law. We, thereafter, affirmed the denial of the petition, but did so without passing upon the timeliness of respondents' claims; we held instead that arbitration should proceed because the parties had agreed to arbitrate "any controversy between [them] arising out of or relating to [their] contract or the breach thereof" and had thus signalled their consent to the submission of all contractually related disputes, among them disputes over the timeliness of claims relating to the contract or its breach, to arbitration. A different result, we thought, would not have been consonant with the policies underlying the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*). The Court of Appeals, however, disagreed and reversed (85 N.Y.2d 193, 623 N.Y.S.2d 800, 647 N.E.2d 1308), holding in the course of so doing that where, as in the present case, the parties had agreed that their contract would be governed by the laws of New York State, the timeliness of the claims sought to be arbitrated was, pursuant to New York law (CPLR 7502[b]), a matter for the court, not the arbitrator (*id.* at 202, 623 N.Y.S.2d 800, 647 N.E.2d 1308). The court saw no conflict between this application of New York law and the policies of the Federal Arbitration Act (*id.* at 203-206, 623 N.Y.S.2d 800, 647 N.E.2d 1308).

The matter was remitted to us with the instruction that we address the merit of petitioner's allegations that respondents' claims are time-barred (*id.* at 207, 623 N.Y.S.2d 800, 647 N.E.2d 1308). We now do so, having until recently stayed consideration of the appeal while related litigation was ongoing in the Eleventh Circuit Court of Appeals (*see, Kahn v. Smith Barney Shearson Inc.*, 115 F.3d 930).

Respondents' claims were interposed in April 1989 and relate to violations which, on the record before us, cannot be said to have occurred subsequent to August 1984. Respondents are Florida residents and their claims undoubtedly accrued in Florida. This being the case, determination of the governing limitations period under New York law requires application of New York's borrowing statute (CPLR 202; *Kidder Peabody & Co. v. McArtor*, 223 A.D.2d 502, 637 N.Y.S.2d 99). Pursuant to that statute, as between the limitation period applicable under New York law and that of the foreign jurisdiction, it is the shorter period that governs (*McCarthy v. Bristol Labs.*, 86 A.D.2d 279, 283, 449 N.Y.S.2d 280). It follows that respondents' claims are, without exception, untimely.

Respondents' claims for violation of securities laws, both Federal and State, are barred by the two-year limitation set forth in Florida's Blue Sky laws (Fla.Stat. § 95.11[4][e]). To the extent that Federal securities law violations are alleged, the Florida Blue Sky limitation period is applicable because in this pre-*Lampf* case (*see, Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 [1991]), it is the limitations period of the forum State which governs (*see, e.g., Armstrong v. McAlpin*, 699 F.2d 79, 87)[1] and, since that State is New York, the applicable limitations period is determined by utilizing the aforecited borrowing statute.

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[1] Indeed, we note that the result in this case would not be different even if *Lampf, supra*, were retroactively applied since under *Lampf* the uniformly applicable limitations period for Federal securities law claims such as those asserted by respondents cannot exceed three years.

Utilization of the borrowing statute, in turn, leads to the conclusion that, as between the potentially applicable New York and Florida limitations periods, it is the shorter two-year period set forth in Florida's Blue Sky Laws that governs. Utilization of the borrowing statute also requires the conclusion that the Florida Blue Sky two-year limitation period is applicable to and thus bars respondents' State securities law claims. To the extent that respondents assert claims for civil theft, the New York analogue of which is conversion or imposition of a statutory liability, such claims are barred by New York's three-year limitations period (CPLR 214[2] and [4]) applicable pursuant to the borrowing statute by reason of the fact that it is shorter than the corresponding Florida limitations period of five years (Fla.Stat.812.035[10]). Respondent's remaining claims for breach of fiduciary duty, negligence and misrepresentation are also barred since they have been interposed subsequent to the expiration of Florida's applicable four-year limitations periods (Fla. Stat. § 95.11[3][a], [j] and [p]), which limitations periods exceed those governing the same causes in New York. Finally, we note that respondents have not met their burden in this or any other context implicated by their various claims, of submitting such proof as would warrant consideration of a possible tolling of an applicable limitations period (*see, Almand Construction Co. v. Evans*, 547 So.2d 626, 628; *see also, Antone v. General Motors Corp.*, 64 N.Y.2d 20, 31, 484 N.Y.S.2d 514, 473 N.E.2d 742).

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 16, 1998.

Present: Hon. Betty Weinberg Ellerin, Justice Presiding
Eugene Nardelli
Richard W. Wallach
Milton L. Williams, Justices.

Smith Barney, Harris Upham & Co., Incorporated,

Petitioner-Appellant,

-against-

Charlie Luckie, Jr., et al.,

Respondents,

-and-

Doris Kahn,

Respondent-Respondent.

M-79 & M-733

Index No. 9909/88

The above-named respondent-respondent having moved for reargument of this Court's decision and order entered on December 4, 1997 (Appeal No. 49778),

And petitioner-appellant having cross-moved for an order striking respondent's motion for reargument as untimely, and for other relief,

Now, upon reading and filing the papers with respect to the motion and cross-motion, and due deliberation having been had thereon,

It is ordered that the motion and cross-motion be and the same hereby are denied.

ENTER:

/s/ Catherine O'Hapan Wolfe
Clerk.

91 N.Y.2d 39

In the Matter of SMITH BARNEY SHEARSON INC. et al., Appellants,

v.

Jeffrey S. SACHAROW et al., Respondents.

In the Matter of SMITH BARNEY, INC., Appellant,

v.

Vivian HAUSE, as Trustee, et al., Under the Hause Revocable Trust Dated May 31, 1990, et al., Respondents.

Court of Appeals of New York.

Dec. 4, 1997.

Brobeck, Phleger & Harrison, L.L.P., New York City (Lawrence E. Fenster and Francis S. Chlapowski, of counsel), Susan E. Harkins and William Hohauser, for appellants in the first and second above-entitled proceedings.

Zuckerman, Spaeder, Goldstein, Taylor & Kolker, L.L.P., New York City (Christopher M. Wilson and Edward J.M. Little, of counsel), for respondents in the first above-entitled proceeding.

Deutsch & Lipner, Garden City (Seth E. Lipner, of counsel), for respondents in the second above-entitled proceeding.

OPINION OF THE COURT

BELLACOSA, Judge.

These two issue-related proceedings concern arbitrability of disputes arising out of respective securities transactions executed by petitioner Smith Barney on behalf of two of its customer investors. Section 15 of the NASD Code of Arbitration Procedure provides that claims of over six years' duration are ineligible for arbitration. In this common procedural setting, that provision evokes two questions: first, arbitrability of the ineligibility time bar and, then, the appropriate forum for the determination of that threshold issue – arbitration or court.

I.

Smith Barney, Inc. (and its broker Edward Greenhill in the *Sacharow* case only) turned to a court under CPLR article 75 to try to stay the Sacharow demand for arbitration. It proceeded likewise and alone against the Hause arbitration demand. Smith Barney now appeals in each proceeding, pursuant to leave granted by this Court, from two Appellate Division orders directing the arbitrations to go forward in plenary fashion. We now affirm.

Sacharow

The brothers Sacharow are the executors of the estate of their father, a deceased physician. In 1994, they filed a statement of claim with the National Association of Securities Dealers (NASD) seeking arbitration concerning investments made by Smith Barney through one of its

brokers, Edward Greenhill. The Sacharows contended that, as a result of their father's medical condition, he was unable to monitor his brokerage account. They alleged that Greenhill made risky and speculative investments, resulting in a substantial depletion of their father's investment account. Their demand for damages and attorney's fees was based on fraud, negligence, and breach of contract.

The customer agreement between Dr. Sacharow and Smith Barney contained two relevant clauses: (1) "[a]ny controversy * * * shall be settled by arbitration" in accordance with the rules of the NASD Code; and (2) the agreement "shall be governed by the laws of the State of New York without giving effect to [its] choice of law or conflict of laws provisions."

Smith Barney and Greenhill moved to block the arbitration on the ground that the claims were ineligible, since the subject transactions were executed six years prior to the filing of the statement of claim. They added that eligibility for arbitration is an arbitrability question, whose determination is reserved solely to the courts.

Supreme Court initially granted the stay, relying on *Matter of Smith Barney, Harris Upham & Co. v. Luckie*, 85 N.Y.2d 193, 623 N.Y.S.2d 800, 647 N.E.2d 1308, *cert. denied sub nom. Manhard v. Merrill Lynch, Pierce Fenner & Smith*, 516 U.S. 811, 116 S.Ct. 59, 133 L.Ed.2d 23. The Sacharows were granted reconsideration upon bringing *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 to the trial court's attention. The nisi prius court then (1) denied Smith Barney's application; (2)

directed the parties to proceed to arbitration; and (3) dismissed the petition.

The Appellate Division affirmed, stating:

> "Initially, we note that rules such as section 15 of the NASD's Code of Arbitration Procedure, which both parties agreed to, are not simply procedural limitations on the timeliness of a claim but limitations on the power of the arbitrator to entertain such claims. Section 15 and other like rules are *eligibility* requirements, not Statutes of Limitation. Absent an agreement by the parties to the contrary, an issue raised pursuant to such sections must be determined by the courts since eligibility is a question of substantive arbitrability. This is true *regardless* of whether the arbitration agreement contains a New York choice of law provision" (238 A.D.2d ___, ___, 656 N.Y.S.2d 203, 204 [citations omitted] [emphasis in original]).

The Appellate Division added that *Mastrobuono* did not overrule or limit the Court of Appeals decision in *Luckie* because "[i]n *Mastrobuono*, the United States Supreme Court simply interpreted the specific language of an 'ambiguous' choice of law clause with respect to the issue of the availability of punitive damages in arbitration under general rules of contract construction" (238 A.D.2d, at ___, 656 N.Y.S.2d, at 204-205). Then, interrelating *First Options of Chicago v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985, the Appellate Division concluded that the language of the *Sacharow* arbitration provision "clearly and unambiguously indicates that the

parties agreed to arbitrate all disputes, including eligibility" (238 A.D.2d, at ___, 656 N.Y.S.2d, at 205 [emphasis in original]).

Hause

Here, the elderly, retired customer authorized a Smith Barney representative to invest a substantial portion of her assets into a single, highly speculative, limited partnership. This occurred in 1986 and 1987, and the authorization was based on Smith Barney's advice. The customer suffered substantial losses and then filed a claim and an arbitration demand with the NASD alleging misrepresentation, among other things. The customer agreement contained the same relevant provisions as in *Sacharow*.

Smith Barney again turned to the court to block the arbitration. Supreme Court granted the stay motion, reasoning that the claims were ineligible under NASD Code § 15. The Appellate Division in this instance reversed and denied the stay (238 A.D.2d ___, 655 N.Y.S.2d 489). The Court noted that while section 15 of the NASD Code is an eligibility provision that would ordinarily constitute a question of arbitrability to be decided by the courts, here the "clear and unmistakable evidence [is] that the parties intended that it would be decided by the arbitrator" and the entire matter should be kept out of the courts (238 A.D.2d, at ___, 655 N.Y.S.2d, at 491). The Court concluded that the plain language of this arbitration clause "clearly extends to the question of whether certain transactions are covered by the scope of the agreement" (238 A.D.2d, at ___, 655 N.Y.S.2d, at 491). Finally, the Court found that

the language in the arbitration clause "overrides any implication that could be drawn from a simple New York choice of law clause that the parties intended that the courts would decide section 15 eligibility" (238 A.D.2d, at ___, 655 N.Y.S.2d, at 492).

II.

The threshold question for us to decide is whether the eligibility feature of section 15 of the NASD Code is a condition precedent to arbitration and, thus, whether it constitutes a question of arbitrability. Smith Barney argues that the plain language of this provision absolutely precludes six-year and older claims from arbitration. It views the six-year time-measuring period as a condition precedent to arbitration. The customers' position is that the section 15 six-year "eligibility" provision is a procedural limitation properly within the arbitrators' contractually agreed-to range of authority (*see, Paine-Webber Inc. v. Elahi*, 87 F.3d 589, 601 [1st Cir.1996]).

Section 15 of the NASD Code provides that "[n]o dispute, claim, or controversy shall be *eligible for submission to arbitration* under this Code where six (6) years shall have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy" (emphasis added). This language limits the subject of, entitlement to and range of arbitrable matters. Thus, it may not be viewed simply as a procedural Statute of Limitations.

Several lower State courts have agreed that section 15 of the NASD Code is a substantive eligibility requirement, rather than just a Statute of Limitations, a "mere" proceduralism (*see, Merrill Lynch, Pierce, Fenner & Smith v.*

Ohnuma, 218 A.D.2d 572, 573, 630 N.Y.S.2d 724; *Matter of Merrill Lynch, Pierce, Fenner & Smith [Manhard]*, 201 A.D.2d 347, 607 N.Y.S.2d 640, *rev'd in part on other grounds* 85 N.Y.2d 193, 623 N.Y.S.2d 800, 647 N.E.2d 1308, *cert. denied* 516 U.S. 811, 116 S.Ct. 59, 133 L.Ed.2d 23; *Merrill Lynch, Pierce, Fenner & Smith v. DeChaine*, 194 A.D.2d 472, 600 N.Y.S.2d 459; *Matter of Prudential Bache Sec. v. Archard*, 179 A.D.2d 652, 653, 579 N.Y.S.2d 890; *but see, Matter of Prudential Sec. [Purello]*, 206 A.D.2d 713, 714, 614 N.Y.S.2d 638). Numerous Federal courts have also reached the same result (*see, Smith Barney v. Sarver*, 108 F.3d 92, 96 [6th Cir.1997]; *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith*, 78 F.3d 474, 481 [10th Cir.1996]; *Merrill Lynch, Pierce, Fenner & Smith v. Cohen*, 62 F.3d 381, 383-384 [11th Cir.1995]; *PaineWebber Inc. v. Hofmann*, 984 F.2d 1372, 1379 [3d Cir.1993]; *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509, 512-513 [7th Cir.1992]; *see also, PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 513 [3d Cir.1990]; *but see, Smith Barney Shearson v. Boone*, 47 F.3d 750, 753 [5th Cir.1995]).

We are persuaded that the plain language of the NASD eligibility rule presents a question of arbitrability. That proviso, thus, creates a substantive feature that may affect the right and obligation to arbitrate.

III.

Turning to the next step of our analysis, we note the well-settled proposition that the question of arbitrability is an issue generally for judicial determination in the first instance (*see, Matter of Primex Intl. Corp. v. Wal-Mart Stores*, 89 N.Y.2d 594, 598, 657 N.Y.S.2d 385, 679 N.E.2d 624; *Sisters of St. John the Baptist v. Phillips R. Geraghty*

Constructor, Inc., 67 N.Y.2d 997, 998, 502 N.Y.S.2d 997, 494 N.E.2d 102; *Matter of Nationwide Gen. Ins. Co. v. Investors Ins. Co.*, 37 N.Y.2d 91, 95, 371 N.Y.S.2d 463, 332 N.E.2d 333; *see also, First Options of Chicago v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 1924, 131 L.Ed.2d 985, *supra; AT & T Technologies v. Communications Workers*, 475 U.S. 643, 649, 106 S.Ct. 1415, 1418-1419, 89 L.Ed.2d 648). An important legal and practical exception has evolved which recognizes, respects and enforces a commitment by the parties, nevertheless, to arbitrate even that issue when they *"clearly and unmistakably [so] provide"* (*AT & T Technologies v. Communications Workers, supra*, 475 U.S., at 649, 106 S.Ct., at 1418 [emphasis added]; *see, First Options of Chicago v. Kaplan, supra*, 514 U.S., at 944, 115 S.Ct., at 1924). Thus, we should examine and determine whether the parties here evinced a "clear and unmistakable" agreement to arbitrate arbitrability as part of their alternative dispute resolution choice.

The Second Circuit Court of Appeals recently applied the exception in a section 15 NASD Code context (*see, PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199 [2d Cir.1996]). It concluded that "the arbitration agreement [which similarly provided that 'any and all controversies * * * shall be determined by arbitration'] evince[d] the parties' intent to submit issues of arbitrability to the arbitrators" (*id.*, at 1196). The court found the "any and all controversies" language of the agreement to be "inclusive, categorical, unconditional and unlimited" (*id.*, at 1199). It noted that "[t]he words 'any and all' are elastic enough to encompass disputes over whether a claim is timely and whether a claim is within the scope of arbitration" (*id.*). The court stated that the appropriate remedy

for the party alleging a violation of section 15 of the NASD Code "is to defend the arbitration action on timeliness grounds, not to enjoin arbitration altogether" (*id.*, at 1200).

We are persuaded that these assembled authorities have fashioned a balanced and sound view. The instant proceedings and appeals thus qualify for application of the arbitrability inclusive exception. Notably, the drafters of these agreements include the investment houses through their customarily uniform industry standards and forms, and they can adequately protect their interests with specificity of inclusion and exclusion.

Coupled with the plain and sweeping language of the arbitration clause in the instant agreements and the analysis of the persuasive authorities, section 35 of the NASD Code (now rule 10324) buttresses our conclusion concerning the parties' intent and commitment to arbitrate the issue of arbitrability. Section 35 provides that "[t]he arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s)."

Courts have interpreted the incorporation of this provision in the agreements of parties as "a 'clear and unmistakable' expression of their intent to leave the question of arbitrability to the arbitrators" (*FSC Sec. Corp. v. Freel*, 14 F.3d 1310, 1312-1313 [8th Cir.1994]; *see, PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1202, *supra*). The reasoning is that "by adopting the NASD Code of Arbitration Procedure as the rules governing their dispute, [the parties] agreed to give the arbitrators discretion via section 35 of [the] Code to

interpret section 15's time limitation" (*FSC Sec. Corp. v. Freel, supra,* 14 F.3d, at 1313). Stated differently, "[t]he language of the [NASD] Code itself commits all issues, including issues of arbitrability and timeliness, to the arbitrators" (*PaineWebber Inc. v. Bybyk, supra,* 81 F.3d, at 1202). Indeed, "[n]othing in the NASD Code removes section 15 from the ambit of section 35" (*id.*).

IV.

We must now round out the interrelated features of this analysis with the New York choice of law provision in the instant customer agreements. The potential clash between an arbitration clause and a New York choice of law provision has engendered some perplexity. To relieve the tensions or balance the competing objectives, we conclude that the parties' contractual choice of New York law should not trump the core arbitration provision. A boilerplate choice of law clause does not necessarily signify the parties' acceptance of limitations imposed by New York law with respect to the contractually conferred power on an arbitrator to determine all issues, including arbitrability. Sharper probity and particularization of analysis are necessary.

Matter of Smith Barney, Harris Upham & Co. v. Luckie, 85 N.Y.2d 193, 623 N.Y.S.2d 800, 647 N.E.2d 1308, *supra,* is instructive. This Court held that the New York choice of law provision in a customer agreement effectively incorporated New York's rule that threshold Statute of Limitations questions are for the courts (*id.*, at 202, 623 N.Y.S.2d 800, 647 N.E.2d 1308; *see,* CPLR 7502[b]). The parties' agreement there included these clauses: an arbitration

clause that " '[a]ny controversy * * * shall be settled by arbitration,' " and a choice of law provision that " '[t]his agreement and its enforcement shall be governed by the laws of the State of New York' " (*id.*). The securities brokers in *Luckie* moved to stay arbitration on the ground that the investors' claims were barred by New York's applicable six-year Statute of Limitations (*id.*, at 198, 623 N.Y.S.2d 800, 647 N.E.2d 1308). The issue, thus, was whether the statutory bar should be resolved by the arbitrators or the courts (*id.*).

Importantly and distinguishably, *Luckie* was narrowly tailored to the specific framework presented by that case and was not projected as a preclusion against parties freely contracting to submit every part of their disputes to arbitration (*see, Matter of Smith Barney, Harris Upham & Co. v. Luckie, supra,* 85 N.Y.2d, at 207, 623 N.Y.S.2d 800, 647 N.E.2d 1308 [Kaye, Ch. J., concurring]). The Court noted the strong "Federal policy favoring liberal enforcement of agreements to arbitrate," a policy New York courts have also long promoted, and stated that a choice of law provision in an agreement will not predominate if "the chosen law creates a conflict with the terms of, or policies underlying, the [Federal Arbitration Act]" (*id.*, at 201, 623 N.Y.S.2d 800, 647 N.E.2d 1308, citing *Volt Information Sciences v. Leland Stanford Jr. Univ.*, 489 U.S. 468, 476, 109 S.Ct. 1248, 1254, 103 L.Ed.2d 488). The Court determined, however, in that particular instance that "the [relevant CPLR provisions] authorizing the courts to consider a time limitation asserted as a bar to arbitration in connection with an application to compel or stay arbitration do not expressly conflict with any provisions of the FAA" (*id.*, at 203, 623 N.Y.S.2d 800, 647 N.E.2d 1308).

Furthermore, the Court very significantly demarcated that "[c]learly, under New York law, *statutory* time limitations questions such as those presented on these two appeals – as opposed to *contractual* time limitations agreed upon by the parties – are for the courts, not the arbitrators" (*id.*, at 202, 623 N.Y.S.2d 800, 647 N.E.2d 1308, citing *Matter of County of Rockland [Primiano Constr. Co.]*, 51 N.Y.2d 1, 9, 431 N.Y.S.2d 478, 409 N.E.2d 951 [emphasis in original]). That effectively differentiates the *Luckie* holding from the instant matters and the analysis that supports the rationale and result we reach here.

First, only a NASD contractual time limitation is at issue in these proceedings. Next, the *Luckie* Court was interpreting the specific language of the subject choice of law provision, which applied to the " 'agreement and its enforcement' " (*id.*, at 198, 623 N.Y.S.2d 800, 647 N.E.2d 1308 [emphasis added]). The Court stated that the arbitration clause "was subject to the parties' additional qualification that New York State law provides the basis of decision for questions concerning *not only the agreement, but more critically, its enforcement*" (*id.*, at 202, 623 N.Y.S.2d 800, 647 N.E.2d 1308 [emphasis added]).

In addition to the cogency of those differentiating features, attention must also be paid to *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76, *supra*. There, the subject customer agreement similarly included a New York choice of law provision along with an arbitration clause requiring that "any controversy" be arbitrated in accordance with the rules of the NASD (*id.*, at 58-59, 115 S.Ct. at 1216-1217). The brokerage house challenged the arbitrator's award of punitive damages on the ground that the choice of law provision

mandated the application of New York law, which prohibits arbitrators from awarding punitive damages (*id.*, at 54, 115 S.Ct. at 1214-1215). The United States Supreme Court reversed both lower courts and held that the arbitrator properly awarded punitive damages, despite the fact that New York law confines the power to award punitive damages to judicial tribunals (*id.*, at 55, 115 S.Ct. at 1215).

The United States Supreme Court declared that "the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, *but not to include special rules limiting the authority of arbitrators*" (*id.*, at 63-64, 115 S.Ct. at 1219 [emphasis added]; *see, PaineWebber Inc. v. Bybyk, supra*, 81 F.3d, at 1200; *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 593, *supra*). In summary, it declared that "the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other" (*id.*, at 64, 115 S.Ct. at 1219).

We, therefore, conclude that the New York choice of law provision in the subject agreements does not diminish the parties' intention to arbitrate "any and all controversies." While a choice of law clause incorporates substantive New York principles, it does not also pull in conflicting restrictions on the scope of the authority of arbitrators and the competence of parties to contract for plenary alternative dispute resolution.

V.

This decision fortifies and advances the long and strong public policy favoring arbitration (*see, Matter of Weinrott v. Carp*, 32 N.Y.2d 190, 199, 344 N.Y.S.2d 848, 298 N.E.2d 42; *see also, Sablosky v. Edward S. Gordon Co.*, 73 N.Y.2d 133, 138, 538 N.Y.S.2d 513, 535 N.E.2d 643; *Mobil Oil Indonesia v. Asamera Oil [Indonesia]*, 43 N.Y.2d 276, 281-282, 401 N.Y.S.2d 186, 372 N.E.2d 21; *Matter of Prinze v. Jonas*, 38 N.Y.2d 570, 574, 381 N.Y.S.2d 824, 345 N.E.2d 295). We have declared that "this State favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties" (*Matter of Nationwide Gen. Ins. Co. v. Investors Ins. Co.*, 37 N.Y.2d 91, 95, 371 N.Y.S.2d 463, 332 N.E.2d 333, *supra; see also, Note, Scope of Arbitration Clauses in Commercial Contracts*, 34 St. John's L. Rev. 236, 249 [May 1960]). Therefore, "New York courts interfere 'as little as possible with the freedom of consenting parties' to submit disputes to arbitration" (*Matter of 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 N.Y.2d 88, 93, 571 N.Y.S.2d 686, 575 N.E.2d 104, quoting *Matter of Siegel v. Lewis*, 40 N.Y.2d 687, 689, 389 N.Y.S.2d 800, 358 N.E.2d 484; *see, Matter of Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 298-299, 169 N.E. 386 [Cardozo, Ch. J.]).

Frankly stated, a contrary result would curtail or divert this progressive and prudent policy favoring arbitration. Parties should be free to opt for this forum outlet and for comprehensive resolution in those settings. Courts should be very hesitant, therefore, to impinge upon the rights and obligations derived from commitments to integrated, relatively speedier and less costly alternative dispute resolution modalities. Lastly, it would

be ironic and anomalous to permit parties from the securities industry, who generally derive benefits from the arbitration method they impose on their thousands of consumers, to elude the comprehensive language of their own industry-drafted arbitration agreements. Having agreed to plenary arbitration, they should not garner that strategic advantage against their aggrieved or dissatisfied customers.

Accordingly, the orders of the Appellate Division should be affirmed, with costs.

KAYE, C.J., and TITONE, SMITH, LEVINE, CIPARICK and WESLEY, JJ., concur.

In each case: Order affirmed, with costs.

[FROM RECORD ON APPEAL
BEFORE THE NEW YORK COURT OF APPEALS]

R18

VERIFIED PETITION DATED MAY 8, 1989

[Pages 18 – 34]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SMITH BARNEY, HARRIS UPHAM & CO. INC.	x	Index No. 9909/89
	x	IAS Part 50o
Petitioner,	x	VERIFIED PETITION
-against-	x	
CHARLIE LUCKIE, JR., BARBARA C. LUCKIE, HENRY C. SATTERFIELD, III, JOHN S. MOOSHIE, JERE A. HUGHES, DORIS KAHN and the AMERICAN ARBITRATION ASSOCIATION,	x	
Respondents.	x	

Petitioner Smith Barney, Harris Upham & Co. Inc. ("Smith Barney") by and through its undersigned attorneys, as and for its verified petition states as follows:

* * *

THE ARBITRATION AGREEMENTS

7. On or about July 21, 1986, Charlie Luckie, Jr. and Barbara C. Luckie ("Luckies") executed Smith Barney's

two-page Securities Account Agreement for their account #075-522864 ("Luckie Securities Account Agreement"). A true copy of the Luckie Securities Account Agreement is annexed hereto as Exhibit A.

* * *

11. On or about September 4, 1981, Henry C. Satterfield III ("Satterfield") executed Smith Barney's Customer Option Account Form and Agreement

* * *

17. On or about April 9, 1987, in connection with opening a Smith Barney "Vantage" account, which provides, among other services, special checking privileges, Mooshie executed a Smith Barney Securities Account Agreements [sic] ("Mooshie Securities Account Agreement").

* * *

21. On or about January 5, 1983, Doris Kahn ("Kahn") executed a Smith Barney Vantage Account Agreement ("Vantage Agreement") for her account #03C-383279. The Vantage Agreement refers to and incorporates by reference the Securities Account Agreement. A blank facsimile of the Securities Account Agreement which was in use at or about the time Kahn executed the Vantage Account Agreement is annexed along with the Vantage Account Agreement as Exhibit G.

* * *

25. . . . The Kahn account was opened in Smith Barney's retail branch office in Fort Lauderdale, Florida. All orders and other transactions in these accounts were

recorded and processed through Smith Barney [sic] "back office"

* * *

43. Doris Kahn transferred her account from Smith Barney in or about August, 1984. Upon information and belief, Doris Kahn was chargeable with knowledge of any prior wrongdoing on the part of Smith Barney at or about that time and with reasonable diligence would have been able to ascertain any such wrongdoing at or about that time.

44. No previous application has been made to this or any other court for the relief sought herein.

WHEREFORE, it is respectfully requested that judgment and order be entered pursuant to Articles 75 and 78 of the Civil Practice Law and Rules:

(i) enjoining the AAA from asserting jurisdiction over, administering or proceeding in any manner with the arbitrations filed by the Individual Respondents against Smith Barney at the AAA;

* * *

(v) dismissing Doris Kahn's claims in their entirety; . . .

Dated: New York, New York
May 8, 1989

At IAS Part 50o of the Supreme Court of the State of New York in and for the County of New York, at the Supreme Court Building, 60 Centre Street, New York, New York, on the 9th day of May 1989

PRESENT:

Hon. NORMAN C. RYP

Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SMITH BARNEY, HARRIS UPHAM & CO. INC.	x	Index No. 9909/89
Petitioner,	x	ORDER TO SHOW CAUSE
-against-	x	
CHARLIE LUCKIE, JR., BARBARA C. LUCKIE, HENRY C. SATTERFIELD, III, JOHN S. MOOSHIE, JERE A. HUGHES, DORIS KAHN and the AMERICAN ARBITRATION ASSOCIATION,	x	
Respondents.	x	

Upon reading the annexed affidavit of Paul K. Barenholtz, sworn to on May 8, 1989, the Verified Petition herein and the exhibits annexed thereto,

NOW, on motion of Petitioner Smith Barney, Harris Upham & Co., Inc., ("Smith Barney"),

1. IT IS HEREBY ORDERED, that Respondents Charlie Luckie, Jr., Barbara C. Luckie, Henry Satterfield, III, John Mooshie, Jere Hughes and Doris Kahn ("Individual Respondents") and the American Arbitration Association ("AAA") show cause before this Court, at IAS Part 50o, 111 Centre Street, Room 421 thereof on the 19th day of May 1989 at 11 o'clock in the fore noon or as soon thereafter as counsel can be heard, why an order should not be entered against Respondents pursuant to CPLR §§ 7503 and 7803: (i) enjoining Respondent AAA from asserting jurisdiction over, administering or proceeding in any manner with the arbitration filed by Individual Respondents, the Luckies, Satterfield, Mooshie, Hughes and Kahn against Petitioner Smith Barney in the AAA; (ii) enjoining the Individual Respondents from proceeding or attempting to proceed to arbitrate their claims against Petitioner Smith Barney in the AAA or any forum other than the New York Stock Exchange ("NYSE"), the National Association of Securities Dealers ("NASD"), or the American Stock Exchange ("AMEX"); (iii) compelling Individual Respondents the Luckies, Satterfield, Mooshie, Hughes and Kahn to submit to arbitration before the NYSE, NASD or AMEX any and all claims against Petitioner Smith Barney that they have filed with the AAA; (iv) in the alternative, compelling the AAA to hold any such arbitrations only in the City of New York; (v) dismissing Kahn's claims as time-barred; and (vi) granting Petitioner Smith Barney such other and further relief as the Court may deem just and proper; and it is further

2. ORDERED that all Respondents are hereby enjoined from proceeding in any manner with the arbitrations filed by the Individual Respondents against Petitioner Smith Barney before the AAA pending hearing and determination by this Court of this Petition; and it is further

* * *

4. ORDERED that the answer or response, if any, to the petition and any affidavits or memoranda in connection therewith be served upon Smith Barney, 333 West 34th Street, Law Dept., New York, New York 10001, attn: Paul K. Barenholtz, attorney for Petitioner Smith Barney on or before May 17th, 1989.

ENTER

May 9, 1989

/s/ NCR
J.S.C.
NORMAN C. RYP

605 NY S2d 838
198 A.D.2d 87
SMITH BARNEY HARRIS UPHAM & CO., INC., Petitioner-Appellant,

v.

Charlie LUCKIE, Jr., et al., Respondents,

and

Doris Kahn, Respondent-Respondent.

Supreme Court, Appellate Division,
First Department.

Nov. 16, 1993.

Order, Supreme Court, New York county (Norman Ryp, J.), entered October 23, 1992, which, insofar as appealed from, denied petitioner's application to dismiss, as time-barred, Federal and State securities claims that respondent-respondent seeks to arbitrate, unanimously affirmed, without costs.

The parties' intention to resolve all disputes by arbitration being clear, dismissal of respondent's claims pursuant to CPLR 7502(b) would defeat the policies of the Federal Arbitration Act (9 USC § 1 *et seq.*) (*see, Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 479, 109 S.Ct. 1248, 1255, 103 L.Ed.2d 488). Accordingly, we affirm the denial of petitioner's application on the ground that the arbitrators should decide the Statute of Limitations issue, including whether New York or Florida law applies.

MURPHY, P.J., and ELLERIN, WALLACH, KASSAL and NARDELLI, JJ., concur.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DORIS KAHN,

Plaintiff,

vs

SMITH BARNEY SHEARSON, INC. (f/k/a SMITH BARNEY, HARRIS, UPHAM & CO.)

Defendant.

_____/

CASE NO. 94-6992-CIV-HURLEY

[Filed MAY 23, 1995]

ORDER GRANTING MOTION TO CONFIRM ARBITRATION AWARD & DENYING MOTION TO VACATE

THIS CAUSE comes before the court upon plaintiff's motion to confirm an arbitration award. On April 4, 1989, plaintiff filed a claim in arbitration before the National Association of Securities Dealers ('NASD'). Arbitration took place in August and September of 1994 in Fort Lauderdale, Florida. In October of 1994, the arbitrators rendered a $360,098.62[1] award in favor of Ms. Kahn. Prior to this award, the parties engaged in years of litigation in state and federal courts in Florida and New York partly in an effort to obtain a judicial determination of the appropriate forum for arbitration and whether Ms. Kahn's claims were time-barred.

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[1] $180,000, plus interest at 10% per annum from October 1, 1984 to October 3, 1984 [sic].

Procedural History

Doris Kahn executed a Smith Barney account agreement which contained an arbitration provision. The agreement also contains a choice of law provision which provides that 'this agreement and its enforcement shall be governed by the laws of the State of New York.' The account was opened in Fort Lauderdale, Florida. A controversy arose between the parties concerning Smith Barney's handling of the account and Ms. Kahn commenced an arbitration proceeding before the American Arbitration Association ('AAA'). Smith Barney filed suit against Doris Kahn and other customers ('respondents') in the Supreme Court of the State of New York. Smith Barney sought to dismiss the claims of Doris Kahn and to stay the arbitrations brought by the other respondents. The respondents sought to dismiss the New York action for lack of personal jurisdiction.

The Supreme Court of New York entered an order to show cause why Kahn's claims should not be dismissed as time-barred and why all of the respondents should not be enjoined from seeking arbitration in any forum others [sic] than those specified in the account agreements. One day after Smith Barney commenced the New York proceeding, two of the respondents filed a Florida state court action seeking to compel AAA arbitration. Smith Barney removed to the Middle District of Florida. The Middle District stayed the action pending resolution of the jurisdiction question and proceedings before the Supreme Court of New York.[2] The Middle District ultimately

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[2] *Charlie Luckie, Jr. et al. v. Smith Barney, Harris Upham & Co., Inc.*, 89-844-CIV-T-17(C) (MD.Fla. Aug. 11, 1989).

denied respondents motion to compel arbitration before the AAA[3] and the Eleventh Circuit affirmed.[4]

The Supreme Court of New York denied Smith Barney's motion to dismiss Doris Kahn's claims as time-barred holding that New York's six year statute of limitations for fraud controlled:

> [T]he New York statutes of limitation and/or Federal apply instead of the Florida statute of limitations. Respondent, Doris Kahn's claim shall proceed in accordance with the Decision of Florida District Court Judge Elizabeth A. Kovachevich dated June 7, 1991, subject to any further Order of such Court or the United States Court of Appeals for the Eleventh Circuit.[5]

Smith Barney appealed the trial court's order which denied the motion to dismiss Kahn's claims as time-barred. The Supreme Court, Appellate Division, First Department, affirmed the denial of the motion to dismiss on different grounds and held that 'the arbitrators should decide the Statute of Limitations issue, including whether New York or Florida law applies.'[6] Smith Barney appealed to the Court of Appeals for the State of New York. That court denied Smith Barney's motion for stay of arbitration pending appeal. The parities proceeded to

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[3] *Charlie Luckie, Jr. et al. v. Smith Barney, Harris Upham & Co., Inc.*, 766 F. Supp. 1116 (M.D. Fla. 1991).

[4] *Id.* at 999 F. 2d 509 (11th Cir. 1993).

[5] *Smith Barney, Harris Upham & Co., Inc. v. Charlie Luckie, Jr., et al.*, 9909/89 (N.Y. Sup.Ct. October 14, 1992) (Ryp, J.).

[6] *Smith Barney, Harris Upham & Co., Inc. v. Charlie Luckie, Jr. et al.*, 605 N.Y.S.2d 838 (N.Y. App. Div. November 16, 1993).

arbitration and the award now in issue was rendered by the NASD panel in Fort Lauderdale, Florida.

This court deferred ruling on Ms. Kahn's motion to confirm pending the disposition of the appeal before the New York Court of Appeals. The Court of Appeals reversed the lower courts and held that the issue of timeliness was for the courts – not the arbitrators. '[W]hen the parties chose to apply New York law "without excluding its arbitration rules" from that general condition, the parties adopted as binding New York's rule that threshold Statute of Limitations questions are for the courts.' *In re Smith Barney, Harris Upham & Co. Inc.*, 85 N.Y.2d 193 (N.Y. 1995).[7] The statute of limitations issue was remitted to the New York Appellate Division, First Department. Those proceedings are presently pending. The issue before this court is whether it should confirm

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[7] That decision is bolstered by the recent United States Supreme Court decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 1995 WL 86555, where the Court held that an arbitrators award allowing punitive damages would be upheld even though the securities contract contained a New York choice of law provision and New York law permits courts – not arbitrators to award punitive damages. The Court reasoned that the New York choice of law provision must be harmonized with an arbitration provision so that

> the laws of the State of New York [are read] to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of the arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other.

Mastrobuono v. Shearson Lehman Hutton, Inc., 1995 WL 86555.

the arbitrator's award or await the resolution of the New York proceedings.

* * *

'The statue does not allow courts to "roam unbridled" in their oversight of arbitration awards, but carefully limits judicial intervention to instances where the arbitration has been tainted in specified ways.' *Robbins*, 954 F. 2d at 683. In addition to the grounds stated in the statue, the Eleventh Circuit permits a district court to vacate an award if it is arbitrary and capricious. *Raiford v. Merrill Lynch, Pierce, Fenner & Smith*, 903 F. 2d 1410 (11th Cir. 1990). Other courts allow an award to be vacated where the arbitrators acted with manifest disregard of the law. *See id.*

Before the court can evaluate the non-statutory grounds for vacating an award, it 'must first determine whether a rational ground for the arbitrators' decision can be inferred from the facts of the case.' *Robbins*, 954 F. 2d at 684. The burden is on Smith Barney to refute the presumption that a lump sum award is correct 'and in turn every rational basis upon which the arbitrator could have relied.' *Id.* 'Only after it is determined that there could be no proper basis for the award, should a court consider looking beyond the statute to determine the applicability of court made standards for the vacatur of an arbitration award.' *Id.*

The court is unable to find that the award was irrational. The panel dismissed Ms. Kahn's allegations of wrongdoing before April 13, 1983, and permitted allegations of wrongdoing arising on or after April 13, 1983, pursuant to Section 15 of the NASD code. The panel

awarded Ms. Kahn $180,000, plus interest at the rate of 10% per annum from October 1, 1984 to October 3, 1994, for a total of $360,098.62. Smith Barney has not met its burden in showing that there is no valid basis for the award. Instead, it contends that the arbitrators erroneously applied a six year statute of limitations instead of Florida's two and five year statutes. The face of the award indicates that timeliness was considered and decided by the panel. 'It is well settled that arbitrators are not required to explain an arbitration award and that their silence cannot be used to infer a grounds for vacating the award.' *Robbins*, 954 F. 2d at 684. 'When the parties agree to submit to arbitration, they also agreed to accept whatever reasonable uncertainties might arise from the process.' *Raiford*, 903 F. 2d at 1413.

* * *

Applying the foregoing principles, and findings no grounds at this time upon which to vacate, modify or correct the award in accordance with the Federal Arbitration Act, it is hereby

ORDERED and ADJUDGED as follows:

1. Plaintiff's motion to confirm the arbitrators award is **GRANTED.**

2. Plaintiff's motion to enjoin the New York state proceedings is **DENIED.**

3. Defendant's motion to vacate the arbitrators award is **DENIED.**

4. Plaintiff's motion for reconsideration is **GRANTED.**

5. Plaintiff shall recover from the defendant, Smith Barney Harris Upham & Co. Inc., $360,098.62 pursuant to the arbitration award rendered by the National Association of Securities Dealers in *In re the Arbitration between Doris Kahn and Smith Barney Harris Upham & Co. Inc.*, case no. 89-0111.

DONE and SIGNED in Chambers at West Palm Beach, Florida, this 23rd day of May, 1995.

Daniel T. K. Hurley
United States District Judge

New York CPLR

§ 7502. Applications to the court; venue; statutes of limitation; provisional remedies.

(a) Applications to the court; venue. A special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action. The proceeding shall be brought in the court and county specified in the agreement; or, if none be specified, in a court in the county in which one of the parties resides or is doing business, or, if there is no such county, in a court in any county; or in a court in the county in which the arbitration was held. All subsequent applications shall be made by motion in the pending action or the special proceeding.

(b) Limitation of time. If, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court as provided in section 7503 or subdivision (b) of section 7511. The failure to assert such bar by such application shall not preclude its assertion before the arbitrators, who may, in their sole discretion, apply or not apply the bar. Except as provided in subdivision (b) of section 7511, such exercise of discretion by the arbitrators shall not be subject to review by a court on an application to confirm, vacate or modify the award.

(c) Provisional remedies. The supreme court in the county in which an arbitration is pending, or, if not yet commenced, in a county specified in subdivision (a), may

entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose) if the application is made before commencement, except that the sole ground for the granting of the remedy shall be as stated above. The form of the application shall be as provided in subdivision (a).

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§ 7503(a) Application to compel arbitration; stay of action

> A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision [b] of section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

N.A.S.D. AWARD, October 11, 1994

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant
Doris Kahn

Case No. 89-01111

Name of Respondent
Smith Barney Harris Upham & Co., Inc.

REPRESENTATION

For Claimant, Doris Kahn ("Kahn"): Robert Dyer, Esq. of Allen, Dyer, Doppelt, Franjola & Milbrath, P.A., of Orlando, Florida.

For Respondent, Smith Barney Harris Upham & Co., Inc. ("Smith Barney"): Paul K. Barenholtz, Esq. of Smith Barney, New York, New York.

CASE INFORMATION

Statement of Claim filed: April 13, 1989 and Amended Complaint filed: July 27, 1994. Claimant's Submission Agreement signed: April 5, 1989.

Response of Smith Barney to Amended Complaint filed: July 29, 1994. Respondent's Submission Agreement signed: August 4, 1994 by Smith Barney.

HEARING INFORMATION

On July 13 and twice on July 26, 1994 pre-hearing conferences lasting three (3) sessions were conducted (via telephone conference call) with an arbitrator on the first two sessions and the full panel on the last session.

On August 2, 3, 4, 16, 17, and September 13, 1994, in Fort Lauderdale, Florida, hearings lasting 12 sessions were conducted.

CASE SUMMARY

Claimant alleged breach of contract, negligence, misrepresentation, violations of federal and state securities laws, and civil theft for improper portfolio management without Claimant's knowing approval and understanding, and that Respondent is liable for the actions for its employee who managed the portfolio.

Respondent denied all allegations of wrongdoing. Respondent alleged the affirmative defenses of waiver, laches, estoppel and statutes of limitation.

RELIEF REQUESTED

Claimant requested unspecified compensatory damages, pre-judgment interest, punitive damages, attorney's fees and costs.

Respondent requested the Claim be dismissed in its entirety.

OTHER ISSUES CONSIDERED & DECIDED

Respondent filed a Motion to Dismiss under Section 15 of the Code. Motion granted with respect to allegations of wrong-doing before April 13, 1983, and denied with respect to allegations of wrong-doing on or after April 13, 1983.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a hand-written, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

AWARD

After considering the pleadings, the testimony, and the evidence presented at the hearing, the Arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

Respondent is found liable and shall pay to the Claimant the amount of $180,000.00, plus interest at the rate of 10% per annum (from October 1, 1984 to October 3, 1994) in the amount of $180,098.62 for a total due to the Claimant of $360,098.62.

Claimant's request for attorney's fees and punitive damages is denied.

Claimant's request for costs is granted and Respondent shall pay the Claimant a total of $5,000.00 for such costs.

OTHER COSTS

The parties shall each bear all other costs and expenses incurred by them in connection with this proceeding including attorney's fees.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of $10,350.00 (2 pre-hearing conferences with one arbitrator x $300.00, 1 pre-hearing conference with full panel x $750.00, plus 12 sessions x $750.00 per session).

Respondent is hereby assessed $10,350.00 for which the NASD shall retain the $750.00 previously deposited by the Respondents and the $1,300.00 previously deposited by the Claimants as partial satisfaction thereof, leaving a balance due of $8,300.00 payable to the National Association of Securities Dealers, Inc.

The NASD shall retain the non-refundable filing fee of $200.00 paid by the Claimant.

Respondent shall reimburse the Claimant $200.00 for the non-refundable filing fee.

Concurring Arbitrators' Signatures

/s/ Garry W. O'Donnell, Esq.	Public
/s/ John Darling	Industry
/s/ Rebecca J. Covey, Esq.	Public

Date of Decision: October 11, 1994

VANTAGE ACCOUNT℠ AGREEMENT[1]

Smith Barney
Harris Upham
SB & Co. Incorporated

PLEASE READ CAREFULLY, SIGN AND RETURN.

This agreement ("Agreement") sets forth the terms and conditions governing the Vantage Account, for which the undersigned applicant(s) (all such signatories hereto, whether acting in their individual or representative capacities, are sometimes referred to hereinafter as "the undersigned") are making application with Smith Barney, Harris Upham and Co. Incorporated ("Smith Barney"). *This Agreement is entered into in conjunction with related agreements between the undersigned and American Express* ("American Express") and Provident National Bank, its subsidiaries and affiliates ("Provident") *as well as the Securities Account Agreement between the undersigned and Smith Barney (the "Securities Account Agreement"*). This Agreement is subject to and may be modified from time to time by the description of "The Smith Barney Vantage Account" which is attached to and precedes the prospectus pertaining to the Vantage Money Market Funds ("the Fund"), and any supplement or amendment thereto as of the time of filing or effectiveness thereof (the prospectus as so amended or supplemented, as the case may be, are hereinafter referred to as the "Prospectus").

Before the services available through a Vantage Account are provided to the undersigned it will be necessary for

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[1] Text typed in its entirety; italics added.

American Express to approve the undersigned's application(s) for the American Express Gold Card(s) ("Gold Card") and for Provident to approve the undersigned's request for Check-Writing Privileges and overdraft credit ("Overdraft Line"). Smith Barney will charge the undersigned's Vantage Account an annual fee. The amount of the fee applicable to a Vantage Account on which only one Gold Card is issued is set forth in the Prospectus. An additional fee, also set forth in the Prospectus, will be imposed for the second and any subsequent Gold Cards (including additional Gold Cards, described below) that are issued in connection with the Vantage Account. All of the foregoing fees are subject to change upon notice to the undersigned.

Subject to the foregoing, it is understood that the Vantage Account will operate as follows:

DESCRIPTION OF VANTAGE ACCOUNT

The Vantage Account is a conventional Smith Barney securities margin account (the "Securities Account") that is linked to the Fund, a Gold Card issued by American Express and a Check-Writing Privilege and $5,000 Overdraft Line provided by Provident. The principal attributes of each component of the Vantage Account and their relation to one another are described below.

SECURITIES ACCOUNT

The Securities Account will be governed by the federal securities laws, the rules and regulations of the Securities and Exchange Commission, the Board of Governors of the

Federal Reserve System, the Securities Investor Protection Corporation, the New York Stock Exchange, Inc., the options exchanges and the National Association of Securities Dealers, Inc. *and by the Securities Account Agreement.*

The undersigned may use the Securities Account to purchase and sell securities, including options, on margin or otherwise. The undersigned understands that rules of the New York Stock Exchange, Inc. require that a minimum of two thousand dollars ($2,000") of equity be maintained in the Securities Account. The undersigned understands that all eligible securities will be held in a margin-type account and agrees to be responsible for all normal brokerage fees for securities transactions and interest on any margin loans.

VANTAGE MONEY MARKET FUNDS

The Fund consists of two portfolios, Vantage Cash Portfolio and Vantage Government Portfolio, one of which the undersigned designates (the "Primary Portfolio"). The undersigned authorizes Smith Barney to invest automatically in Primary Portfolio shares any Available Cash (that is, any cash in a Securities Account that is available to the undersigned on demand and may be transferred out of the undersigned's Securities Account without giving rise to interest charges). Such automatic investment of Available Cash in Primary Portfolio shares will occur, not less frequently than weekly, and in some cases, daily, at the net asset value per share next determined.

Shares of the Fund will be redeemed at their net asset value and the undersigned authorizes automatic redemptions, as necessary, to satisfy debit balances resulting

from Securities Account transactions, from use of the Gold Card or from use of the Check-Writing Privilege as described below. The undersigned may also redeem shares of the Fund directly by written or oral request to Smith Barney.

Orders for the purchase or redemption of Fund shares will become effective as provided in the Prospectus. The undersigned agrees that Smith Barney may reasonably withhold access to the redemption proceeds of Fund shares purchased by checks or other instruments credited to the undersigned's Vantage Account, as described in the Prospectus.

The Fund will declare dividends daily as earned, and pay dividends monthly on shares of the Fund owned by the undersigned. Purchased shares begin to accrue dividends on the day following the day on which the undersigned's order is effective. The undersigned recognizes that dividends are paid in additional shares of the same Portfolio.

THE GOLD CARD

The undersigned, and any additional Cardholders (described below), may use the Gold Card to charge goods and services at establishments where the Gold Card is accepted ("Gold Card Charge Transactions") and to access cash and Travelers Cheques at certain locations by effecting Gold Card Drafts ("Gold Card Draft Transactions"). Such Gold Card Charge Transactions and Gold Card Draft Transactions are collectively referred to herein as "Gold Card Transactions."

The undersigned agrees that each individual undersigned applicant (and, in the case of partnership accounts, any general partner of the undersigned) may apply for and receive Gold Card(s) to be used in connection with the Vantage Account ("Cardholder(s)"). The undersigned further agrees that the Cardholders, acting jointly, may apply for and authorize the issuance by American Express of Additional Gold Cards to certain individuals for use in connection with the Vantage Account ("Additional Cardholder(s)") and the undersigned agrees that the Total Program Value (as defined below) in the Vantage Account may be used to pay for all Gold Card Transactions made by use of such Gold Cards and Additional Gold Cards. The undersigned further agrees that Smith Barney may act as his or her agent to pay American Express for all such Gold Card Charge Transactions, and Provident for all such Gold Card Draft Transactions, by automatically and directly debiting the Vantage Account on the periodic basis described below. The undersigned agrees to have sufficient assets in his or her Vantage Account, in Available Cash shares of the Fund, or available margin loan value (collectively referred to herein as "Total Program Value"), to pay for all such Gold Card Transactions when payment is due.

Subject to notification of change, either oral or written, the undersigned elects the following to be the Primary Portfolio for the Vantage Account:

____ Cash Portfolio ____ Government Portfolio

The undersigned consents and agrees to all of the terms and conditions appearing above and

as continued on the reverse hereof and acknowledges receipt of a copy thereof.

FOR USE BY SOLE PROPRIETORSHIPS AND PARTNERSHIPS ONLY

The undersigned hereby represents and warrants that he or she has authority to open this account, to place assets in the account, and to use the assets of the entity mentioned below, as set forth in the attached documentation of such authority required by Smith Barney.

ACCOUNT NUMBER 03C-383279

FOR USE BY INDIVIDUAL OR JOINT ACCOUNTS ONLY

CLIENT
NAME DORIS KAHN

SIGNATURE /S/

DATE January 5, 1983

SECURITIES ACCOUNT AGREEMENT

Smith Barney, Harris Upham & Co.
Incorporated
1345 Avenue of the Americas
New York, N.Y. 10105

Gentlemen:

In consideration of Smith Barney, Harris Upham & Co. Incorporated ("Smith Barney") accepting one or more accounts of the undersigned (whether designated by name, number or otherwise) and agreeing to act as brokers for me in the purchase or sale of securities or commodities, I hereby agree as follows:

APPLICABLE RULES AND REGULATIONS

All transactions entered into under this agreement shall be subject to the constitution, rules, regulations, customs and usages of the exchange or market, and its clearing house if any, where such transactions are executed by Smith Barney or its agents and, to all applicable laws and rules and regulations of governmental authorities and self-regulatory agencies. If any statute, rule or regulation is enacted that would be inconsistent with any of the provisions of this agreement, the provision so affected shall be deemed modified or superceded by such statute, rule or regulation but the remaining provisions of this agreement shall remain in effect. Except as herein provided, no provision of this agreement may be waived, altered, modified or amended unless the same is in writing and signed by an authorized official of Smith Barney.

* * *

(Terms and Conditions Continued on Reverse)

I hereby consent and agree to all of the terms and conditions of the Agreement appearing above and as continued on the reverse hereof.

CLIENT'S NAME _____ (Please Print)

CLIENT SIGNATURE _____ [No Signature – facsimile only]

CLIENT'S NAME _____ (Please Print)

CLIENT SIGNATURE _____ (If Joint A/C Both Must Sign)

ACCOUNT NUMBER ____ DATE _____

AUTHORITY TO LOAN

Smith Barney, Harris Upham & Co.
Incorporated
1345 Avenue of the Americas
New York, N.Y. 10105

Gentlemen:

You are hereby specifically authorized to lend to yourselves, as principal or otherwise, or to others, any securities held by you on margin for any accounts of the undersigned or as collateral therefor, either separately or with other securities.

This agreement shall inure to the benefit of your successors, by merger, consolidation or otherwise, and

assigns, and you may transfer the account of the undersigned to any such successors or assigns.

CLIENT SIGNATURE _____

DATE _____ CLIENT SIGNATURE _____

(If Joint A/C Both Must Sign)

[*Reverse Side of Securities Account Agreement*]

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ARBITRATION OF CONTROVERSIES

Any controversy between Smith Barney and me arising out of or relating to this contract or the breach thereof, shall be settled by arbitration, in accordance with the rules, then obtaining, of either the Boards of Arbitration of the New York Stock Exchange, American Stock Exchange or National Association of Securities Dealers as I may elect. If I do not make such election by registered mail addressed to Smith Barney at Smith Barney's main office within five (5) days after receipt of notification from Smith Barney requesting such election, then I authorize Smith Barney to make such election on my behalf. The award of the arbitrators, or of a majority of them, shall be final, and judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction. The federal securities laws provide that agreements may not bind persons to waive compliance with any provision of the federal securities laws. Therefore, nothing in this paragraph shall in any way constitute a waiver or limitation of any rights which the

undersigned may have under federal securities laws. The provisions of this paragraph do not apply to commodity accounts, which are governed by the provisions of the Commodity Customer's Agreement.

GOVERNING LAW

This agreement and its enforcement shall be governed by the laws of the State of New York and its provisions shall be continuous; shall cover individually and collectively all accounts which I may open or re-open with Smith Barney, and shall enure to the benefit of Smith Barney's present organization, and any successor organization, without regard to any change or changes at any time in the personnel thereof, for any cause whatsoever, and of the assigns of Smith Barney's present organization, and of the assigns of any successor organization, and shall be binding upon me and/or my estate, executors, administrators and assigns, and, if a corporation, partnership or other business combination shall be binding on its successors and assigns.

* * *

HEADNOTES

The above headnotes have been inserted solely for the purpose of convenience in description and under no circumstance shall be deemed to qualify any of the rights set forth in the provisions.

[MATERIAL FROM PETITIONER'S ANSWER BRIEF/ MOTION TO DISMISS BEFORE THE APPELLATE DIVISION, DATED OCTOBER 7, 1997]

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. . . Arbitration discovery was finally completed in August 1994 – and guess what? Smith Barney could only come up with the same unsigned facsimile 'Securities Account Agreement' as already in this Record. [page 3]

* * *

2. In any judicial proceeding under §§7502-03, the party with the burden of persuasion would show to the judge or jury two elements of proof: (a) executed binding documents that either contain or clearly incorporate an arbitration clause and a NYCOL; (b) testimony to support the time-bar defenses, which when weighed against the claimant's testimony is either persuasive by a preponderance or is clear and convincing.

3. Counsel acknowledges that a judicial proceeding under §§7502-03 does not necessarily affect the entire arbitration, no matter where it is to be tried. (Of course Smith Barney wants summary judgment based on an old and undeveloped record that it must acknowledge suddenly became relevant only after the Court of Appeals decision.)

4. The question before the Court therefore becomes, Can it both take away an issue from the arbitrators in an out-of-state proceeding and then proceed to try that issue, which may or may not materially affect that arbitration? If Smith Barney survives the factual challenge (that there is no operative COL) it is Mrs. Kahn's position that §4 of the FAA, as unmistakably interpreted and

applied in the *Lauer* decision, jurisdictionally prevents this Court from going one step further. *Laura* is not to be lightly scanned. For this reason it is attached hereto as Appendix B.

5. Section 4 of the Arbitration Act provides in relevant part as follows:

> "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed."

6. The Lauers were sold limited partnerships, *inter alia*. They later moved from Illinois to Florida. By 1993 the Lauers "had come to believe that their investment account was being handled improperly and that they had been duped about the health of their retirement funds." *Id.* at 325. The Lauers commenced an NASD arbitration. The NASD selected Tampa, Florida as the arbitration site over the protests of Merrill Lynch. Not surprisingly, Merrill Lynch filed an action in the Northern District of Illinois, "seeking to compel arbitration in that district and to force the Lauers to eliminate both their claims for punitive damages and all claims involving the investments made more than six years before the complaint was filed." *Id.* The lower court declined to change the arbitration site, but ordered the Lauers "to eliminate their claims for punitive damages and any claim more than six years

old," all in accordance with Seventh Circuit case law. *Id.* at 326.

In turning to the FAA, the Seventh circuit stated the question this way:

> "Does §4 authorize a district court to compel a party to replead its arbitration complaint when the arbitration is already slated for another district?" *Id.* 326.

Merrill Lynch of course argued that the Lauers were exceeding the terms of the arbitration agreement by pursuing stale claims and seeking punitive damages (not allowed under New York law). The Court pointed out that the initial language of §4 "quickly narrows," and

> " . . . clearly requires a geographic link between the site of the arbitration and the district which, by compelling arbitration *or directing its scope*, exercises preliminary control. The statute is perhaps awkwardly worded for present purposes in that the mandatory language ties the location of arbitration to the district in which the motion to compel is brought. Nonetheless, the inescapable logical import of the present situation, in which the location of arbitration is preordained, is that the statute limits the fora in which the §4 motions can be brought." (Emphasis added.) *Id.* at 327.

Of course Merrill Lynch attempted to distinguish earlier §4 cases "on the grounds that the requested relief in the instant case was distinct from the motion to compel denied by the district judge." *Id.* 328. The Seventh Circuit was not persuaded:

> "We view this as a distinction without a difference. Merrill Lynch filed a §4 motion to compel arbitration in the Northern District of Illinois in an attempt to place substantive limitations on the Lauers' complaint. Whether this was to be achieved by actually compelling the arbitration in Illinois, or by relying on our precedent to create a Seventh Circuit-style arbitration in Florida, is immaterial. Merrill Lynch cannot rely on semantics by framing the request as one for injunctive relief to evade the general commands of §4. Allowing an 'injunction' to achieve the same effect as a properly filed motion to compel – the reviewing of the arbitrability of the complaint by the district court – would frustrate §4's clearly stated commands." *Id.* at 328.

7. In *Lauer*, Merrill Lynch initially succeeded in reshaping the arbitration issues by motion practice. In the case at bar, Smith Barney has succeeded – apparently by virtue of the full faith and credit clause – in framing an issue for an evidentiary judicial trial which may or may not actually affect the arbitration that has already taken place or will someday again take place.

8. Smith Barney's second task is to convince this Court that due process, Manhattan style, and the principles of *forum non conveniens* are not offended by compelling Doris Kahn and her witnesses to come to New York for a statute of limitations trial. But Smith Barney's first task is to overcome §4's absolute jurisdictional proscription on a trial in New York, as well as the *forum non conveniens* aspect implicit in §4. It is respectfully submitted that Smith Barney cannot advance a single factual argument suggesting that New York City is the proper forum for a judicial trial on the statute of limitations, let

along the legally "convenient" venue. Therefore, the strictures of §4 as articulated in *Lauer* are fully applicable to the case at bar:

> "Section 4 is aimed at streamlining the path toward arbitration and preventing scattershot attacks in various judicial fora. Its application in the instant case is only too clear.
>
> "Viewing §4 in this way, as a prescription for judicial economy that entails channeling pre-arbitration litigation into the appropriate forum, is consistent with the previous decisions of this Circuit holding that the venue provisions of §§9 and 10 of the FAA are permissive rather than mandatory. . . . in contrast [to §§9 and 10], §4 is mandatory in its terms, directing that 'the hearing and proceedings . . . shall be within the district in which the petition for an order directing such arbitration is filed.' 9 U.S.C. §4 . . . need not be read in lockstep with §§9 and 10." *Id.* at 329.

In pointing out that the path of pre-litigation should be confined to the district where that arbitration is to take place, the Court in *Lauer* said,

> "The facts of this case offer a textbook demonstration of the inefficiencies and potential inequities to be achieved if the dictates of §4 are ignored . . . " *Id.* at 330.

The pleading and judicial strategy and tactics of Merrill Lynch in *Lauer* pale in comparison to what has occurred at the case at bar. Having successfully pleaded a case for a judicial trial on its statute of limitation defense, Smith Barney must now attend that trial, and attend in the

Southern District of Florida, because §4 gives it no other choice.

CONCLUSION

Nowhere is it written that Smith Barney or any other Wall Street giant must always get its way in the New York court system. But it is written that all persons are entitled to equal justice under the law. Doris Kahn would now appreciate a dollop of justice from this Court. For better or worse, she picked an attorney who does not wear down, who will not give up. Smith Barney's BIG BLUFF should be judicially exposed on this record by this Court.

This Court cannot take a blurred microfiche and pull Smith Barney's choice of law clause from oblivion. And Smith Barney cannot convincingly tell this Court that it is all right to treat §4 of the FAA as a mere venue technicality.

Accordingly, Doris Kahn respectfully prays for the following relief:

1. An order dismissing this action with prejudice by reason of Smith Barney's failure to demonstrate that Doris Kahn is contractually bound by any customer agreement containing an arbitration provision and a New York Choice of Law clause.

2. Alternatively, an order requiring Smith Barney to come forward with the original Vantage Account Agreement with the language highlighted which refers to and incorporates the facsimile Securities Account Agreement (without which Smith Barney's argument vaporizes).

3. An order articulating precisely how Smith Barney can hold Doris Kahn to a New York Choice of Law clause and a judgment dismissing or staying this action and directing the parties to resolve the statute of limitations issue in the Southern District of Florida, where the arbitration took place and the next arbitration, if needed, will take place someday.

4. Alternatively, an order staying further proceedings in the Court pending a ruling on Smith Barney's opposition to Doris Kahn's Motion for Early Scheduling Conference in the Southern District of Florida.

5. Alternatively, an order remanding this cause to the trial court for trial on the time-bar merits.

SUPREME COURT OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

SMITH BARNEY, HARRIS UPHAM & CO., INCORPORATED,

Plaintiff-Appellant,

New York County Clerk's Index No. 9909/89

v.

DORIS KAHN,

Respondent-Respondent.

_____/

MOTION FOR REARGUMENT

COMES NOW, DORIS KAHN, Respondent-Respondent, by her undersigned counsel and moves this Court pursuant to § 600.14(a) for reargument with respect to its December 4, 1997 decision, reported at 1997 N.Y. App. Div. LEXIS 12505. (A copy is annexed hereto.) In support thereof counsel would show unto the Court as follows:

I.

REGARDLESS OF THE APPLICABILITY VEL NON OF A NYCOL, THIS COURT HAS NO IN PERSONAM JURISDICTION OVER DORIS KAHN UNDER THE AUTHORITIES OF THIS STATE.

* * *

II.

THIS COURT DENIED DORIS KAHN DUE PROCESS BY DECIDING THE CASE ON THE BASIS OF A NON-FACT: THERE IS NO AGREEMENT INCORPORATING BY ITS TERMS A FACSIMILE SECURITIES ACCOUNT

AGREEMENT, NOR DID THIS COURT ADDRESS THIS ISSUE IN ITS DECEMBER 4, 1997 DECISION; THEREFORE, THIS COURT HAS NO BASIS UPON WHICH TO ADJUDICATE SMITH BARNEY'S STATUTE OF LIMITATIONS DEFENSE, REGARDLESS OF THE HOLDING BY THE NEW YORK COURT OF APPEALS, WHICH ITSELF PROCEEDED ON THE BASIS OF THE SAME NON-FACT.

a. The decision by the New York Court of Appeals, albeit based upon the same non-fact, may be excused because the record copies of the Vantage Account Agreement and the blank Securities Account Agreement, supplied by Smith Barney from its own microfiche copy machine, were difficult to read. Therefore that Court *must have believed* Smith Barney's allegation that the Vantage Account Agreement "refers to and incorporates" the unsigned Securities Account Agreement. Further, local New York counsel for Doris Kahn also bought into Smith Barney's claim and believed that there was an effective arbitration agreement with a NYCOL.

b. *However, this Court does not have the same freedom of assumption:* 1) Doris Kahn's Answer Brief/Motion to Dismiss served October 7, 1997 pointed out in no uncertain terms that there was no Agreement containing or incorporating a NYCOL, and that arbitration discovery, completed in August 1994, turned up no executed Securities Account Agreement; 2) the Court will recall that there were signed Securities Agreements for original Respondents *Charlie Luckie and his wife, Henry Satterfield* and joint account holders *John Mooshie and Jere Hughes.* See Answer Brief/Motion to Dismiss at 5-6. It is clear beyond the peradventure of a doubt that the chief ally of Smith

Barney's allegations that the Securities Account is incorporated into the Vantage Account is the fact that it has furnished copies of these documents that are almost impossible to read. However, this Court had before it, attached as Appendix A to Doris Kahn's October 1997 Answer Brief/Motion to Dismiss "a typed and easy to read exact duplicate of the Vantage Account Agreement." *Id.* at 7. Counsel can readily believe that Smith Barney would repeatedly attempt to deceive this and every other court; but Doris Kahn's counsel, with three and one-half decades of experience, refuses to believe that this Court would condone such deception; surely no judicial oath can sanction a private judicial injustice based on such deception. Finally, since this Court, in effect, denied Mrs. Kahn's motion to dismiss, and denied the alternative request to remand to the trial court, it is respectfully submitted that the better practice, to achieve justice, would be to direct her counsel to respond on the merits. Considering that the Court had before it only a 1989 record devoid of facts, that would seem the logical next step.

c. Attached here to as Exhibit A is the Affidavit of Doris Kahn's counsel, Robert Dyer, to which is attached his November 24, 1997 letter to Brobeck, Phleger & Harrison LLP, counsel of record for Smith Barney before this Court. This letter in part stated that Doris Kahn's Answer Brief/Motion to Dismiss "pointed out to the Court that there did not seem to be any language in the Vantage Account Agreement that referred to and incorporated the unsigned Securities Account Agreement." *Id.* The letter continued,

> "Thereafter Mr. Fenster wrote David Spokony with the Clerk's Office, sort of seeking permission to file a Reply Brief. On October 10, 1997 I also wrote Mr. Spokony stating that I had no objection to 'Mr. Fenster filing a Reply Brief, addressing the very existence of language in the Vantage Account document that 'refers to and incorporates' a facsimile securities agreement.' To date there has been no reply on behalf of Smith Barney."

d. There is an old saying, "If we are not part of the solution we may be part of the problem." The undersigned counsel certainly stands ready to be corrected in his reading of the Vantage Account Agreement, but right now he believes that Smith Barney devoutly wishes that the words "in conjunction with" could be transmogrified to "incorporated herewith." Moreover, this Court should demand that counsel of record to be 100% candid with it, and if Smith Barney's contract construction and interpretation suffers, said counsel of record should so advise the Court. Nevertheless, the obligations of Smith Barney's counsel of record cannot and do not relieve this Court of the duty of conscientiously making a good faith analysis of Smith Barney's factual position that has kept Doris Kahn at bay lo these many years. The issue is not simply one of "pro industry" vel non. The issue is, just how far can Smith Barney go with this non-fact, based on virtually impossible to read copies? Unfortunately, counsel feels that this issue is like a two-front battle, against both Smith Barney and this Court. It should not be this way. Our system of jurisprudence contemplates written decisions that shine the light of truth on both legal and factual issues. By any fairly-judged standard the reading

public cannot tell the real issues of the case from the December 4, 1997 opinion.

e. It is a credit to any court to discover and acknowledge a factual error. But to do otherwise confounds every principal of Anglo-American jurisprudence, albeit the public may never know what really occurred.

f. Once again, counsel for Doris Kahn challenges Smith Barney's prestigious counsel of record to employ standard principles of contract construction and show this Court just how a NYCOL is incorporated into the Vantage Account Agreement.

III.

THE COURT ERRED FUNDAMENTALLY IN NOT GRANTING DORIS KAHN'S MOTION TO DISMISS, MADE ON THE GROUNDS THAT "§ 4 OF THE FEDERAL ARBITRATION ACT ABSOLUTELY FORBIDS A COURT BEYOND THE FEDERAL DISTRICT WHERE THE ARBITRATION IS TO BE HELD FROM INTERFERING IN ANY WAY WITH THE ISSUES OF THAT ARBITRATION." See Doris Kahn's Answer Brief/ Motion to Dismiss at 4.

a. This prong of Doris Kahn's Motion To Dismiss Smith Barney's September 18, 1997 Supplemental Brief was argued at pages 14-20 of Answer Brief/Motion To Dismiss.

b. The Court's decision dated December 4, 1997 does not address in any fashion this issue, even though Smith Barney made no reply to this fundamental issue of jurisdiction.

c. The Court of Appeals did in fact decide that Doris Kahn was subject to §7502-7503 even though she was a Florida resident who had her account with Smith Barney's office in Fort Lauderdale office at all relevant times. However, the Court of Appeals did not address the issue of WHERE a judicial statute of limitations proceeding under §7502-7503 should be held (albeit the Court no doubt assumed a New York trial situs).

d. At the very least, this Court should require Smith Barney to address the argument made under §4 of the Federal Arbitration Act and the recent decision of *Merrill Lynch, Pierce, Fenner & Smith v. Lauer*, 49 F.3d 323 (7th Cir. 1995).

IV.

BY RULING FAVORABLY ON SMITH BARNEY'S STATUTE OF LIMITATIONS ARGUMENT ON THIS BARE RECORD, AT AN INTERMEDIATE APPELLATE LEVEL, THIS COURT MOST GRIEVOUSLY DENIED DORIS KAHN THE RIGHT TO BE HEARD ON THE PIVOTAL STATUTE OF LIMITATIONS QUESTION, NAMELY, WHEN DID SHE DISCOVER HER CLAIM AGAINST SMITH BARNEY AND ITS FORMER BROKER BABITSKAS

a. The prior decisions of the courts of this State in this cause have decided only questions of law; no court has yet been called upon to conduct an actual trial-like factual proceeding on the merits of Smith Barney's statute of limitations defenses. At the arbitration conducted in 1994, Smith Barney failed at least in part on its statute of limitations defenses; accordingly, Doris Kahn's factual

position is certainly not frivolous. Where a higher appellate court remands to an intermediate appellate court fur further proceedings, which involve the determination of factual issues, witnesses and documentary evidence, that intermediate court should and customarily does remand to a trial judge for such further factual proceedings as may be required, including resolution by a bench or jury trial.

b. Smith Barney's Verified Petition for a stay of arbitration filed May 8, 1989 against Doris Kahn, et al and the American Arbitration Association basically challenged the customer's right to arbitrate before the American Arbitration Association pursuant to the AMEX provisions of the Constitution of the American Stock Exchange, Article VIII, §§1-2. Nearly all of the 44 paragraphs of the Verified Petition – found at R-18-33 – deal with the customer agreements signed by the three other respondents as well as the Vantage Account Agreement signed by Doris Kahn, which Smith Barney said, "refers to and incorporates a facsimile securities account agreement." The sole reference to a statute of limitations defense with respect to Doris Kahn is based only upon "information and belief" and is set forth in paragraph 43, to wit:

> "Doris Kahn transferred her account from Smith Barney in or about August, 1984. Upon information and belief, Doris Kahn was chargeable with knowledge of any prior wrongdoing on the part of Smith Barney at or about that time and with reasonable diligence would have been able to ascertain any such wrongdoing at or about that time." R. 32.

c. In May 1989 Judge Ryp entered the Order To Show Cause (and stay of the arbitration before the American Arbitration Association). R-11 et seq.

d. On August 31, 1989 Judge Ryp ordered Respondents (including Doris Kahn) to answer within 20 days. R-272.

e. On September 18, 1989, the individual Respondents filed a joint renewed objection to this Court's in personam jurisdiction and an answer; the answer dealt only with the AMEX window issue, R-274. Therefore the case came on before Judge Ryp in the posture of a motion for judgment on the pleadings. The answer by the individual Respondents did not set forth a paragraph by paragraph response to the Verified Petition. There was indeed no specific response to Smith Barney's allegation that Doris Kahn's claims. "upon information and belief," were barred by the applicable statute of limitations.

f. Three years later on October 14, 1992, Judge Ryp denied Smith Barney's motion to dismiss Doris Kahn's claims as time-barred. R-5,9. (In the meantime, the federal court in Florida took up the Amex Window issue.) Judge Ryp held that New York's, not Florida's statute of limitations applied (and therefore there was no time bar problem).

g. On November 16, 1993, this Court affirmed but on different grounds, holding that "the parties intention to resolve all disputes by arbitration being clear, dismissal of Respondent's claims pursuant to CPLR §7502(b) would defeat the policies of the Federal Arbitration Act . . . " Thus this Court did not have occasion to reach

any factual issue, from the bare record below, with respect to Smith Barney's statute of limitations defense.

h. In its February 21, 1995 decision the Court of Appeals wrote,

> "Since the Appellate Division in each case before us did not address the Statute of Limitations Arguments, including applicability of the borrowing statute, relevant accrual dates, tolls and extensions by virtue of each panel's conclusion that the question was for the arbitrators, we remit in each case for such a determination."

i. Respondent Kahn, by her counsel, well recognizes that this Court is not about to change its analysis of the various statutes of limitations, which statute is shorter, which analog to apply, etc. However, this Court surely treads on due process ground when it writes,

> "Finally, we note that respondents have not met their burden in this or any other context implicated by their various claims, of submitting such proof as would warrant consideration of a possible tolling of an applicable limitations period . . . [Citation to *Almand* omitted]."

Surely this Court must realize that justice, if not common judicial sense, suggests the need to develop the factual portion of the issue now before the Court and that such development should not take place before a three-judge court, as in France, but should take place before a judge and/or a jury. Similarly, this Court has before it only Smith Barney's "upon information and belief" bare allegation made back in 1989 in paragraph 43 of its Petition (at R-32). Similarly, Smith Barney's other citation, R-132, is to its own Memorandum of Law which states,

> "She has made no showing whatsoever as to the nature and accrual of her claim or her reasonableness in ascertaining these facts . . . hence, her claim must be dismissed . . . her other claims are barred by Florida's four year statutes of limitations."

In short, this Court must recognize that *Smith Barney has the burden of proof and it has furnished no facts to support its defense.* This Court can hardly have shifted the burden of proof on such a defense from Smith Barney to Doris Kahn.

k. In other words, Smith Barney has done nothing but allege that "upon information and belief" Doris Kahn should be barred from bringing claims in arbitration in April 1989, less than 4 years 8 months after the account was closed in August 1984. Perhaps the reason why Smith Barney did not attempt such a factual showing is simply because it knew that its Smith Barney broker, John Babitskas, moved to Dean Witter and took Doris Kahn's account with him – and kept up the same modus operandi, namely, commission-oriented trading, which finally either led to dismissal or resignation of Babitskas from Dean Witter in late 1988. Shortly after that Doris Kahn, then being without a broker, asked her family to review her account assets . . . and the rest is history.

The Alternative Written Contract is Governed By a Five-Year Statue of Limitations

l. Under *no circumstances* is Doris Kahn's breach of contract claim barred, for it is governed by § 95.11(2)(b) if this Court declares there is, *in fact*, an incorporated Securities Account Agreement: See Doris Kahn Affidavit

attached hereto as Exhibit B, to which is attached Doris Kahn's July 25, 1994 Amended Complaint before the NASD. Paragraph 31, the last paragraph of the amended complaint, states:

> "The foregoing allegations make Smith Barney liable for the actions of their employee or employees for federal and state securities violations, a violation of Florida's civil theft law, and further make Defendant liable for breach of fiduciary duty, negligence, misrepresentation and *breach of contract.*" (Emphasis added.)

m.(i) Surely Smith Barney knew when it filed its Supplemental Brief in September, 1997 that the arbitration complaint upon which the case was tried included a claim for breach of contract. If it is judicially declared that there is a customer agreement – as seems to be the Court's intention – then there is a breach of contract claim and a five-year Florida statute of limitations. See § 95.11(2)(b) Fla. Stat. The facsimile Securities Account Agreement is thoroughly standard in that it provides that:

> **"APPLICABLE RULES AND REGULATIONS**
>
> All transactions entered into under this agreement shall be subject to the constitution, rules regulations, customs and usages of the exchange or market, and its clearing house if any, where such transactions are executed by Smith Barney or its agents and, to all applicable laws and rules and regulations of governmental authorities and self-regulatory agencies." R53.

(ii) Moreover, the NASD Arbitration Award, under Case Summary, plainly states that "Claimant alleged

breach of contract, negligence . . . " etc. See Ex. D. to Doris Kahn's Affidavit. Both parties to the arbitration signed the *necessary* NASD Submission Agreements; Doris Kahn's at Ex. C to her Affidavit. But as Smith Barney well knows, Doris Kahn sought arbitration before the NASD pursuant to § 1 (now § 10101) of that SRO's Code of Arbitration, which provides for arbitration of "any dispute, claim, or controversy" between a customer and a member. This demand of course was accompanied by an executed Submission Agreement thereby creating a written contract for arbitration upon the instant that Smith Barney filed. And of course Smith Barney did in fact sign and submit a Submission Agreement. It was signed and submitted on August 4, 1994, the *third day* of the arbitration. See the NASD Award, page 1, Ex. D. to Doris Kahn's Affidavit (Ex. B. to this Motion for Reargument) and Ex. B to counsel's Affidavit (Ex. A to this Motion). Thus, Doris Kahn in fact went to arbitration pursuant to a written arbitration agreement based upon standard Submission Agreement, which do not contain a NYCOL. So therein lies Smith Barney's own hoist and petard: for now we have one and maybe two written contracts.

n. Moreover, when there is a broker/customer relationship, it is consensual and therefore contractual. And if there is no securities agreement, there is no NYCOL, and no jurisdiction whatsoever. In any event, a breach of fiduciary duty is governed by § 95.11(3)(p), the four-year statute. But Smith Barney claims and this Court held December 4, 1997 that there was a customer agreement. Therefore, the claim is governed by the Florida five-year statute.

Finally, it would surely be an abuse of judicial discretion to confine either party to a 1989 record when the arbitration was heard in 1994 on a complaint which claimed breach of contact. At the very least the Federal Arbitration Act should not countenance such a Draconian procedure for customers whose claims must be arbitrated.

o. It may be true that Doris Kahn in 1989 raised no specific factual issue with respect to moving her account to Dean Witter with the same broker and only later discovering her losses. Perhaps it would have been better had she or her counsel done so back in 1989 when this matter was before the trial court, and then again in the summer of 1994 when she filed her amended complaint before the NASD. However, the Verified Petition had only one paragraph (out of 44) dealing with Doris Kahn and a general time-bar claim. Neither the Supreme Court nor this Court (with one additional sitting judge) previously saw any reason to consider the specific factual concerns that Smith Barney was well aware of but provided no factual information concerning. Appellate courts simply do not decide statute of limitations questions that by their nature are intensely fact-intensive. Similarly, appellate courts *should not shift the burden of proof* from the proponent of a statute of limitations defense to the claimant. It is not enough for Smith Barney to have alleged in its original 1993 Reply Brief before this Court that

> "She was alerted in the Verified Petition and the Memorandum of Law (*See* R32 at ¶ 43 & R132) to make a proffer to satisfy any claimed 'discovery rule' yet she did not do so." Smith Barney Reply Brief April 29, 1993 at 2.

As noted above, the Verified Petition contained no facts whatsoever. "Information and belief" contemplates a second Chapter, by Smith Barney. Similarly, the Memorandum of Law, at R132, only said

> "She has made no showing whatsoever as to the nature and accrual of her claim or her reasonableness in ascertaining these facts. . . . Hence, her claim must be dismissed." R132

p. If this statute of limitations defense of Smith Barney's is to be determined by a court in New York, it ought to be determined by a trial court, with or without a jury, and the burden of proof ought to be on Smith Barney. The issue of a jury vel non – if requested – certainly should be an issue to be decided by the trial judge in the first instance. Nevertheless, Doris Kahn's affidavit is of course based upon personal knowledge. This affidavit (Ex. B) certainly raises factual issues which would be taken as true by a trial court in the absence of countervailing proof by Smith Barney: in ¶ 4 of her affidavit Doris Kahn swore under oath as follows:

> "4. As set forth in the Amended Arbitration Complaint, my account at Smith Barney's Fort Lauderdale office was closed in or about July 1994, as my then Smith Barney broker John Babitskas moved to Dean Witter Reynolds, Inc and took my account with him. As further set forth in paragraphs 25 and 26, at Dean Witter Mr. Babitskas from July 1984 through December 1988, a period of 4 1/2 years, engaged in excessive trading, particularly in options. His Dean Witter trading accounted for some 1,331 trades, generating $348,000 in commissions and $213,000 in margin interest on an average equity of $280,000, all as set forth in paragraph 26 of the

> Amended Arbitration Complaint. After he left Dean Witter in December 1988, Affiant, then without a broker, asked a member of her family to look over her investments and give her advice. Her son-in-law, Alan Jacobson, reviewed the Dean Witter statements and then asked to see her Smith Barney monthly statements. Some time in January 1989 he advised Affiant that the accounts seemed to have been excessively traded, with unsuitable securities and strategies and that she should seek legal help from someone familiar with these types of cases."

q. Smith Barney argued in its April 23, 1993 Reply Brief to this Court that there is, in effect, only the narrowest of circumstances in Florida that allow tolling of the statute of limitations. See that Reply Brief at 9 *et seq.* Smith Barney's attempts to distinguish *Hawkins v. Washington Shores Savings Bank,* 509 So. 2d 1314 (Fla. 5th DCA 1987), is indicative of its genuine concern for Florida law. Smith Barney writes,

> "[The case] involved six causes of action arising out of the defalcation of funds from plaintiff's bank account yet apparently not done by her or reflected in her passbook. For purposes of the motion to dismiss the court took as true plaintiff's allegation that she did not discover her money was missing until some two and one-half years before she filed suit. The appellate court remanded for the jury to decide the factual issue raised as to when plaintiff had a duty to discover the invasion of her legal rights." (Smith Barney's Reply Brief at 11.)

Counsel for Smith Barney failed to point out that

> "Although the facts indicate that Hawkins opened her account on April 1, 1963 she has alleged that she did not discover that her money was missing until July 7, 1981." 509 So. 2d at 1315.

Smith Barney well knew of the strong fiduciary relationship between its former broker, John Babitskas, and Doris Kahn, an elderly widow. A fiduciary relationship and its effect on "discovery" was noted in *Puchner v. Bache Halsey Stewart, Inc*, 553 So. 2d 216, 217 (Fla. 3d DCA 1989), where the court pointed out that "The obligation of a fraud victim to exercise due diligence is less demanding where the perpetrator is rendering an expert service while standing in a fiduciary capacity."

r. The tolling issue was raised and discussed in Doris Kahn's April 2, 1993 Brief before this Court at pp. 13-19. Copies of these pages are attached hereto as Exhibit C. On the record before this Court, neither party – Smith Barney which has the burden of proof on its limitations defense, nor Doris Kahn – had actually set forth facts upon which a judge or jury should even begin to decide statute of limitations issues.

As a practical matter, this Court surely knows that a trial on the statute of limitations defense is for all intents and purposes a trial on the merits, except for the damages portion of the proceeding. This absence of trial-court proof was addressed in Doris Kahn's April 2, 1993 Brief before this Court:

> "Smith Barney complains in its brief that Mrs. Kahn has come forward with 'not one word of proof' on whether the applicable statutes of limitations had been tolled. No evidentiary hearing

> or summary judgment proceeding was ever held in this case. More to the point, however, no such evidentiary proceedings in the trial court would have been proper, for any issue of time-bar defenses should be and (presumably will be, eventually) a matter for the arbitrators to decide once the issue of which arbitral forum will administer the case is resolved." *Id.* at 15.

s. In other words, the first three New York courts to deal with *Kahn* have dealt only with legal issues, arriving at three different answers. Not one of those Courts had occasion even to make an effort to decide factual issues upon which a statute of limitations defense (based on a four-year statute plus discovery) could fairly be decided: 1) The Supreme Court held that New York's six-year statute of limitations would apply, thereby mooting any fact-oriented proceedings; 2) this Court held (properly in Mrs. Kahn's view) that time-bar issues should be decided by the arbitrators where the arbitration obligation covered "any controversy"; and 3) the Court of Appeals, believing that the blank facsimile securities account agreement was incorporated into the Vantage Account Agreement, held that Article 75NYCPLR was not preempted by the Federal Arbitration Act.

t. This Court apparently has now decided further factual inquiries are unnecessary and in doing so obviates the need to deal with Florida's discovery rule as it applies to tolling of the Florida two and four-year statutes of limitations. That is not procedurally correct, and it certainly is not correct as a matter of law. Particularly is this so since Doris Kahn went to arbitration on a breach of contract claim governed by either a four-year or a five-year statute of limitations.

u. *Knieriemen v. Bache Halsey, Steward Shields, Inc.*, 427 N.Y.2d 10 (N.Y.App. 1st Dept. 1980), favors Doris Kahn's position, as a matter of law, but as a matter of practicality may reflect this Court's view of hapless investors. Florida's discovery rule – which embodies tolling principles – is straightforward, but is fact-intensive, that is, a job for a bench or jury trial. In addition to the *Hawkins* case, *supra*, see *Brugiere v. Credit Comerciale France*, 679 So. 2d 875-877-78 (Fla. 1st DCA 1996); *Sheen v. Jenkins*, 629 So. 2d 1033 (Fla. 4th DCA 1993); and *Drake v. Island Community Church*, 462 So. 2d 1142 (Fla. 3d DCA 1985). In *Knieriemen, supra*, Judge Lynch wrote:

> "When, we borrow the shorter one-year Louisiana statute, we must, however, take it 'fully encumbered with all the foreign state's rules as to tolls, disabilities, etc. The question is not simply how long is the foreign statute of limitations, but rather, is the action barred by the law of the foreign state' . . . [citations omitted." 427 N.Y.S. 2d at 14-15.

Respectfully submitted,

/s/ Robert Dyer
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EXHIBIT B

SUPREME COURT OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

SMITH BARNEY, HARRIS
UPHAM & CO.,
INCORPORATED,

Plaintiff-Appellant,

New York County Clerk's
Index No. 9909/89

v.

DORIS KAHN,

Respondent-Respondent.
_____/

AFFIDAVIT OF DORIS KAHN,
RESPONDENT-RESPONDENT

STATE OF FLORIDA

COUNTY OF BROWARD

Before me the undersigned authority appeared Doris Kahn, who being duly sworn, deposed and stated as follows:

1. This Affidavit is based upon personal knowledge.

2. I am the Claimant in the NASD arbitration styled *Doris Kahn, Plaintiff, v. Smith Barney, Harris Upham & Co., Inc., Defendant,* Case No. 89-01111.

3. Attached hereto as Exhibit A is a true copy of the Amended Arbitration Complaint served by my counsel on July 25, 1994.

4. As set forth in the Amended Arbitration Complaint, my account at Smith Barney's Fort Lauderdale office was closed in or about July 1994, as my then Smith Barney broker John Babitskas moved to Dean Witter Reynolds, Inc. and took my account with him. As further set forth in paragraphs 25 and 26, at Dean Witter Mr. Babitskas from July 1984 through December 1988, a period of 4 1/2 years, engaged in excessive trading, particularly in options. His Dean Witter trading accounted for some 1,331 trades, generating $348,000 in commissions and $213,000 in margin interest on an average equity of $280,000, all as set forth in paragraph 26 of the Amended Arbitration Complaint. After he left Dean Witter in December 1988, Affiant, then without a broker, asked a member of her family to look over her investments and give her advice. Her son-in-law, Alan Jacobson, reviewed the Dean Witter statements and then asked to see her Smith Barney monthly statements. Some time in January 1989 he advised Affiant that the accounts seemed to have been excessively traded, with unsuitable securities and strategies and that she should seek legal help from someone familiar with these types of cases.

5. Affiant thereupon sought and retained her present counsel, who filed arbitrations both at the American Arbitration Association and then at the National Association of Securities Dealers; these filings took place in the spring of 1989, all within several months from discovery of her claims against both Dean Witter and Smith Barney. Attached hereto as Exhibit B is a true copy of Affiant's April 12, 1989 letter of complaint to the NASD; and attached hereto as Exhibit C is a true copy of her submission agreement executed April 5, 1989.

6. The Dean Witter arbitration has long been concluded in Doris Kahn's favor. The Smith Barney arbitration was concluded in Affiant's favor in early October 1994. A copy of the NASD arbitration award is attached hereto as Exhibit D.

7. At the NASD arbitration hearing, which commenced in August 1994, Smith Barney raised and the arbitrators considered the statute of limitations issue, as well as the six-year eligibility issue. At the conclusion of the first morning session, Affiant and her counsel were advised that only transactions undertaken within six years from the filing of the arbitration complaint could be considered. To Affiant's knowledge, the arbitrators made no express ruling at the time on Smith Barney's statute of limitations defense. However, because of the ruling on the six-year eligibility issue, Affiant's expert witness was required to recalculate the damages and return to the hearing the next day to testify as to those damages occurring within the eligible period.

8. Affiant is ready, willing and able to have the arbitration tapes of her testimony concerning the early 1989 discovery of her claims transcribed and presented to this Court or any such Court deemed appropriate for determining the factual issues here involved.

Further, Affiant sayeth naught.

/s/ Doris Kahn
DORIS KAHN

The foregoing instrument was acknowledged before me this 19 day of December, 1997, by Doris Kahn, who is personally known to me or who has produced FL. DL – K500 16121 = 640 as identification.

/s/ Lauren E. Meghoo
NOTARY PUBLIC

My Commission Expires

(SEAL) LAUREN E. MEGHOO
MY COMMISSION # CC 632580
EXPIRES: March 25, 2001
Bonded Thru Notary
Public Underwriters

Excerpts from **EXHIBIT A** [To Doris Kahn's Affidavit]

NATIONAL ASSOCIATION OF SECURITIES DEALERS

DORIS KAHN,

Plaintiff,

v. Case No. 89-01111

SMITH BARNEY, HARRIS, UPHAM & CO., INC.,

Defendant.

_____/

AMENDED COMPLAINT

Pursuant to agreement of counsel, Doris Kahn submits this her Amended Complaint:

1. Plaintiff Doris Kahn is a resident of Ft. Lauderdale, Florida, is in her mid-60's, and has been a victim of securities violations and account abuse by broker John Babitskas at two successive firms. First, at Smith Barney Harris Upham, from 1980 to the Summer of 1984 and then at Dean Witter Reynolds Inc. from 1984 through 1988.

* * *

31. The foregoing allegations make Smith Barney liable for the actions of their employee or employees for federal and state securities violations, a violation of Florida's civil theft law, and further make Defendant liable for breach of fiduciary duty, negligence, misrepresentation and breach of contract.

Wherefore, Plaintiff Doris Kahn prays for a finding (1) that Smith Barney is liable to Doris Kahn under the

Florida Securities Act, Ch. 517, under Chs. 812 and 772 and the common law counts; and that Smith Barney should be liable for compensatory damages, prejudgment interest and costs.

Respectfully Submitted,

EXHIBIT B [To Doris Kahn's Affidavit]

April 12, 1989

Federal Express

Deborah Masucci
Director of Arbitration
NASD, Inc.
33 Whitehall Street
8th Floor
New York, New York 10004

Re: Kahn vs. Smith Barney, Harris, Upham & Co., Inc.
STATEMENT OF CLAIM

Dear Ms. Masucci:

This letter shall constitute the Statement of Claim of Doris Kahn against Smith Barney. This claim arises out of unsuitable trading and strategies and/or churning in Ms. Kahn's account at the Ft. Lauderdale office of Smith Barney. Such trading activity and strategies resulted in violations of the securities laws of the United States and Florida, deliberate breach of fiduciary duty, civil theft under Chapter 812 Fla. State, misrepresentation and negligence.

As a result of such conduct and omissions on the part of the broker, branch manager and compliance and other officials in New York employed by Smith Barney, Ms. Kahn's account sustained substantial compensatory damages. Demand is therefore made for recovery of

(a) Compensatory damages together with the income and growth the account realistically should have earned;

(b) Pre-judgment interest on the compensatory damages, costs and fees of this action and costs and expenses of expert witnesses pursuant to §517.211(6) and Chapter 812 Fla. Stat.;

(c) A reasonable attorneys' fee as provided for actions under Chapters 517 and 812;

(d) Punitive damages in the sound discretion of the arbitrators;

(e) Such other relief as the arbitrators find appropriate under the circumstance.

Respectfully submitted,

/s/ Robert Dyer
Robert Dyer

RD:lc

No. 98-143

FILED
AUG 24 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DORIS KAHN,

Petitioner,

—v.—

SMITH BARNEY, HARRIS UPHAM & CO., INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF IN OPPOSITION

Lawrence E. Fenster
Counsel of Record
Francis S. Chlapowski
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(212) 581-1600

Attorneys for Respondent

26 pp

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction of an appeal from the judgment of an intermediate state appellate court when discretionary review by the highest court of the state in which a decision could be had has not been sought?

2. Whether this Court has jurisdiction of an appeal from the judgment of an intermediate state appellate court, on remand from the highest court of the state, that seeks review of so-called "federal" issues that were finally resolved in 1995, should have been raised in a petition for a writ of certiorari in 1995, and are now untimely?

3. Whether this Court has jurisdiction of an appeal seeking review of a decision construing the unambiguous terms of an arbitration agreement in accordance with general state law principles of contract construction?

4. Assuming this Court reaches the issue, whether the parties agreed to allow pre-arbitration judicial determination of limitations defenses?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29 DISCLOSURE

Pursuant to Rule 14.1(b), the parties to the proceedings below include:

Doris Kahn, petitioner
Smith Barney, Harris Upham & Co. Incorporated (now known as Smith Barney Inc.), respondent
American Arbitration Association
Charlie Luckie Jr.
Barbara C. Luckie
Henry C. Satterfield, III
John S. Moshie
Jere A. Hughes

Pursuant to Rule 29.6, the following is a list of all parent and subsidiary corporations of respondent Smith Barney, Harris Upham & Co. Incorporated, which is now known as Smith Barney Inc.:

Travelers Group Inc.
- Salomon Smith Barney Holdings Inc.
  - Smith Barney Inc.
    - Robinson-Humphrey Insurance Services Inc.
      - Robinson-Humphrey Insurance Services of Alabama, Inc.
    - SBHU Life Agency of Arizona, Inc.
    - SBHU Life Agency of Indiana, Inc.
    - SBHU Life Agency of Ohio, Inc.
    - SBHU Life Agency of Oklahoma, Inc.
    - SBHU Life Agency of Texas, Inc.
    - SBHU Life Agency of Utah, Inc.

SBHU Life Insurance Agency of Massachusetts, Inc.
SBS Insurance Agency of Hawaii, Inc.
SBS Insurance Agency of Idaho, Inc.
SBS Insurance Agency of Maine, Inc.
SBS Insurance Agency of Montana, Inc.
SBS Insurance Agency of Nevada, Inc.
SBS Insurance Agency of Ohio, Inc.
SBS Insurance Agency of South Dakota, Inc.
SBS Insurance Agency of Wyoming, Inc.
SBS Insurance Brokerage Agency of Arkansas, Inc.
SBS Insurance Brokers of Kentucky, Inc.
SBS Insurance Brokers of New Hampshire, Inc.
SBS Insurance Brokers of North Dakota, Inc.
SBS Life Insurance Agency of Puerto Rico, Inc.
SLB Insurance Agency of Maryland, Inc.
Smith Barney Life Agency Inc.
Smith Barney (Hong Kong) Limited
Smith Barney (Netherlands) Inc.
Smith Barney International Incorporated
Smith Barney (Singapore) Pte Ltd.
Smith Barney Pacific Holdings, Inc.
Smith Barney (Singapore) Pte Ltd.
Smith Barney Pacific Holdings, Inc.
Smith Barney (Asia) Limited

Smith Barney Pacific Holdings, Inc.
Smith Barney Securities Pte Ltd.
Smith Barney Puerto Rico Inc.
The Robinson-Humphrey Company, LLC

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OPINIONS BELOW

The decision and order of the New York Appellate Division, First Department from which petitioner purportedly seeks certiorari is set forth in an opinion reported at *Smith Barney, Harris Upham & Co. v. Luckie,* 665 N.Y.S.2d 74 (App. Div., 1st Dep't Dec. 4, 1997). In that decision, the Appellate Division determined that petitioner's arbitral claims against respondent were barred by the limitations periods applicable to those claims. Reargument was denied by an order of the Appellate Division, First Department, dated April 16, 1998 that is not yet reported.

The Appellate Division's decision was issued after the case was remitted to it from the New York Court of Appeals pursuant to a 1995 New York Court of Appeals decision reported at 85 N.Y.2d 193, 623 N.Y.S.2d 800, 647 N.E.2d 1308, *reargument denied*, 85 N.Y.2d 1033, 631 N.Y.S.2d 291, 655 N.E.2d 404 (1995), which is the decision that petitioner actually seeks to review here.[1] The Court of Appeals' decision held that, based on the terms of the parties' arbitration agreement, courts were empowered to resolve respondent's limitations defenses to petitioner's arbitral claims. The 1995 decision of the New York Court of Appeals followed a grant of leave to appeal from a

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[1] This 1995 decision applied to a companion case as well, entitled *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manhard.* By contrast with petitioner here, the losing party in that decision timely petitioned this Court for certiorari in 1995 making many of the same arguments petitioner raises here. That petition was denied by this Court. *See Manhard v. Merrill Lynch, Pierce, Fenner & Smith Inc,* 516 U.S. 811 (1995).

1993 decision of the Appellate Division, First Department, reported at 198 A.D.2d 87, 605 N.Y.S.2d 838 (App. Div., 1st Dep't 1993), which held that respondent's limitations defenses were subject to arbitral determination under the Federal Arbitration Act ("FAA"). The original opinion of the New York Supreme Court, New York County, dated October 14, 1992, was not officially reported. In that decision, the court held that petitioner's arbitral claims were timely.

JURISDICTION OF THIS COURT

The order and decision of the Appellate Division, First Department, as to which petitioner purports to seek a writ of certiorari, was entered on December 4, 1997 and petitioner's motion for reargument of that decision was denied on April 16, 1998. The Appellate Division's December 4, 1997 decision was issued after the case was remitted to the Appellate Division from the New York Court of Appeals, pursuant to its February 21, 1995 decision. The New York Court of Appeals' 1995 decision is the decree that actually forms the basis of the petition. As explained below, this Court lacks jurisdiction of this appeal for several reasons.

First, although petitioner purports to rely on 28 U.S.C. § 1257 as the basis for jurisdiction, this appeal is not sought from "the highest court . . . in which a decision could be had . . . ." *See* 28 U.S.C. § 1257(a). Specifically, petitioner seeks certiorari from an intermediate appellate court, without first having sought leave to appeal to the New York Court of Appeals.

Second, the petition is untimely. Petitioner seeks a writ of certiorari to review a 1995 New York Court of

Appeals decision that ultimately decided the only arguably "federal" issues in her petition. Since the 1995 remittitur from the New York Court of Appeals to the Appellate Division was for the limited purpose of resolving respondent's statute of limitations defenses to petitioner's claims, and the federal issues raised in this petition would not have been revisited by the New York Court of Appeals, petitioner should have sought a writ of certiorari in 1995.

Third, this appeal does not involve any substantial federal question. The only issue petitioner seeks to appeal to this Court is the New York Court of Appeals' 1995 construction of a contract in accordance with New York law and its conclusion that the agreement was unambiguous under New York law.

REASONS FOR DENYING PETITION

COUNTER-STATEMENT OF THE CASE

This is an action to permanently stay an arbitration commenced by petitioner against respondent on the grounds that her arbitral claims are barred by the applicable statutes of limitations. Petitioner commenced the arbitration that is the subject of this lawsuit in 1989, despite the fact that she removed her account, in which transactions that form the basis of her claims were made, from respondent in 1984. Respondent submits that courts are empowered to resolve this issue based on a New York choice of law clause that governs petitioner's arbitration agreement and its enforcement. New York arbitration law, a manifestly pro-arbitration statute upon which the FAA was actually modeled, *see Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 n.13 (1967),

specifically allows pre-arbitration judicial resolution of limitations defenses. *See* N.Y. Civ. Prac. L. & R. 7502, 7503.

The procedural history of this case is long and complex, primarily due to the existence of several collateral proceedings commenced by petitioner in Florida state and federal courts. These proceedings had the effect of significantly prolonging the resolution of the issues squarely presented to the New York Court by respondent in 1989. The procedural history is set out in a variety of reported decisions in this matter, the most exhaustive of which is contained in *Kahn v. Smith Barney Shearson Inc.*, 115 F.3d 930, 931-32 (11th Cir.), *reh'g and sugg. for reh'g en banc denied*, 124 F.3d 930 (11th Cir. 1997). *See also Smith Barney, Harris, Upham & Co. v. Luckie*, 85 N.Y.2d 193, 623 N.Y.S.2d 800, 647 N.E.2d 1308 (1995), *on remittitur*, 665 N.Y.S.2d 74 (App. Div., 1st Dep't 1997). In the interest of brevity, respondent will not reiterate the procedural history of this case here, but in so doing in no way accepts or admits petitioner's Statement of the Case.

I. THIS COURT LACKS JURISDICTION BECAUSE THE PETITION DOES NOT SEEK REVIEW FROM THE HIGHEST COURT OF THE STATE OF NEW YORK IN WHICH A DECISION COULD BE HAD

The United States Code allows this Court to review by writ of certiorari final decisions rendered by "the highest court of a State in which a decision could be had . . . ." 28 U.S.C. § 1257. If the highest court of a State

provides for discretionary review of lower court orders, such review must be sought and denied before review of an intermediate appellate court decision may be sought in this Court. *See Banks v. California*, 395 U.S. 708, *reh'g denied*, 396 U.S. 869 (1969); *Stratton v. Stratton*, 239 U.S. 55 (1915).

Here, petitioner seeks review of a final decision of an intermediate New York appellate court. New York law specifically allows review of such decisions by the New York Court of Appeals with the permission of the Appellate Division or the Court of Appeals, upon motion made within 30 days after service of notice of entry of the Appellate Division order. *See* N.Y. Civ. Prac. L. & R. 5513, 5602. Petitioner elected not to seek such review.

Petitioner argues in her petition that such an appeal would have been "futile" because the Court of Appeals' earlier decision was the "law of the case", had subsequently been "reaffirmed" by the Court of Appeals, and would not have been addressed again by the Court of Appeals. The law, however, requires petitioner to at least seek such review and does not contain a "futility" exception. *See Gorman v. Washington University*, 316 U.S. 98, 100-01, *reh'g denied*, 316 U.S. 711 (1942); *Great Western Tel. Co. v. Burnham*, 162 U.S. 339 (1896); *McComb v. County Commissioners*, 91 U.S. 1 (1875); *see also* ROBERT C. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO, KENNETH S. GELLER, SUPREME COURT PRACTICE, ch 3.11, at 112 (7th ed. 1993) ("Even though the appellate court considers itself bound on the second appeal by its decision on the first appeal, making the second appeal a mere formality, the second appeal is a prerequisite to Supreme Court review."). Accordingly,

this Court lacks jurisdiction to consider petitioner's proposed appeal.

II. THIS COURT LACKS JURISDICTION BECAUSE PETITIONER SEEKS REVIEW OF A "FINAL" DECISION RENDERED MORE THAN 3 YEARS AGO

Section 1257 allows review by writ of certiorari of "final" decisions of the highest state court in which review may be had. The "finality" requirement of § 1257 is satisfied in several categories of cases in which the decision on the federal issues is considered "final" for purposes of § 1257, even though additional substantive proceedings remain to be completed in the lower state courts. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975).

One of those categories in which a decision is deemed "final" and hence ripe for potential review by this Court is:

> where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant causes of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In

> these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Id. at 482-83.

The Court of Appeals' 1995 decision here falls within this category of "final" for purposes of § 1257. The "federal" issue, to the extent there is one, was resolved in the 1995 decision and would not be revisited by the Court of Appeals on a subsequent appeal under New York law. *See United Commodities-Greece v. Fidelity Int'l Bank*, 64 N.Y.2d 449, 454, 489 N.Y.S.2d 31, 32, 478 N.E.2d 172, 173, *rearg. denied*, 65 N.Y.2d 923, 493 N.Y.S.2d 1030, 483 N.E.2d 136 (1985).

Further, resolution of the "federal" issue in petitioner's favor (*i.e.*, a reversal by this Court) would have resulted in an end to the litigation, because it would have meant that respondent's limitations defenses were to be resolved by the arbitrators, not courts.

Finally, although respondent respectfully submits that no federal question is raised by the Court of Appeals' 1995 decision, if petitioner's FAA arguments here (and those she previously made before the New York Court of Appeals) are correct, then the Court of Appeals' decision did implicate federal policy and, according to petitioner, seriously eroded that policy. As such, the Court of Appeals' 1995 decision that respondent's limitations defenses were for courts, not arbitrators, to resolve was

"final" for purposes of 28 U.S.C. § 1257 and the instant petition. *Cox*, 420 U.S. at 482-83.

Since the Court of Appeals' 1995 decision is the "final" order sought to be reviewed herein, and petitioner moved for reargument of that decision in 1995, which was denied, the petition for certiorari is untimely. Under 28 U.S.C. § 2101(c), a petition for writ of certiorari must be sought within 90 days after entry of the judgment or decree sought to be reviewed. The 90 day time period under § 2101(c) may only be extended an additional 60 days. *Id.* This Court lacks jurisdiction to consider petitions that that are not timely filed. *See* Sup. Ct. R. 13.2.

The petition for a writ of certiorari here, filed more than three years after the final decision that petitioner seeks to reverse is untimely and, therefore, beyond the jurisdiction of this Court.

III. THIS COURT LACKS JURISDICTION BECAUSE THE PETITION DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION

Even assuming petitioner can overcome the technical defects to her petition, she must face a more fundamental problem. In order for this Court to review the 1995 decision of the New York Court of Appeals, that decision must involve a substantial federal question. *See Benz v. New York State Thruway Auth.*, 369 U.S. 147 (1962); *Bunn v. State of North Carolina*, 336 U.S. 942, *reh'g denied*, 336 U.S. 971 (1949). It does not.

This Court has repeatedly stated that arbitration agreements simply are private contracts and ordinary state

law principles of contract construction apply to their interpretation. *First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995); *Mastrobuono v. Shearson Lehman Hutton Inc.*, 514 U.S. 52, 58-64 (1995) (applying state law contract construction principles); *Volt Info Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989). It is similarly well-settled that this Court ordinarily does not sit to review questions of contract construction under state law, including the construction of arbitration agreements. *Volt*, 489 U.S. at 474; *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579 n.9 (1981).

The FAA is implicated in this analysis, but not *substantially* when the agreement is found to be unambiguous, like the agreement here. That is, once the terms of a contract are determined in accordance with ordinary state law principles of contract construction, and no ambiguity is found to exist, the FAA simply requires enforcement of that agreement according to its terms, unless such enforcement would directly conflict with overriding goals and policies of the FAA. *Volt*, 489 U.S. at 476-77. Since the FAA allows parties to arbitration agreements to control in large part the rules and procedures under which they will arbitrate, agreeing to arbitrate in accordance with state arbitration law that simply allows pre-arbitration judicial determination of limitations defenses does not undermine any goals and policies of the FAA. *See Mastrobuono*, 514 U.S. at 57; *Volt*, 489 U.S. at 479.

This Court's decision in *Mastrobuono* does not alter this analysis. In *Mastrobuono*, this Court did not address enforcement of an unambiguous agreement

allowing judicial determination of limitations defenses. The Court simply reviewed the agreement there to determine whether it precluded the arbitral award of punitive damages, in the absence of a definitive ruling by the highest court of the state whose law was to be applied. *Mastrobuono*, 514 U.S. at 58 ("the case before us comes down to what the contract has to say about the arbitrability of petitioners' claim for punitive damages").

According to the Court, the agreement at issue in *Mastrobuono*, because it was ambiguous on the issue and was drafted by the securities firm, allowed punitive damages demands to be arbitrated. *Id.* at 58-64. Since the agreement here has been determined by the New York Court of Appeals to clearly require judicial resolution of limitations issues, this Court's construction of a different agreement concerning a different issue in *Mastrobuono* is inapposite.

This Court in *Mastrobuono* reviewed a decision of a federal court whose sole basis for subject matter jurisdiction was diversity. The Court distinguished its earlier decision in *Volt* on this ground and declared that it was simply reviewing "a federal court's interpretation of this contract" and could therefore review that interpretation *de novo*. *Mastrobuono*, 514 U.S. at 60 n.4.; *see id.* at 71-72 (Thomas, J., dissenting) ("This case amounts to nothing more than a federal court applying Illinois and New York contract law to an agreement between parties in Illinois . . . . [T]he majority's interpretation of the contract represents only the understanding of a single federal court regarding the requirements imposed by state law.")

Here, the New York Court of Appeals construed the agreement in accordance with normal principles of contract construction and held that it unambiguously required judicial determination of limitations defenses prior to the arbitration. According to the Court of Appeals:

> Although the parties broadly agreed to arbitrate "any controversy" arising from the customer agreements, that clause -- like all other provisions in the contract -- was subject to the parties' additional qualification that New York State law provides the basis of decision for questions concerning not only the agreement, but more critically, its enforcement. Accordingly, we conclude that under this agreement the parties agreed to refer questions of timeliness to the courts by incorporating New York law.

Luckie, 85 N.Y.2d at 202, 623 N.Y.S.2d at 805, 647 N.E.2d at 1313. This determination should not be reviewed by this Court. *Mastrobuono*, 514 U.S. at 60 n.4; *Volt*, 489 U.S. at 474. Since the Court of Appeals here found that the parties had clearly agreed to this procedure as a matter of state law contract construction, it found that enforcement of that agreement would not be inimical to the policies underlying the FAA; indeed, such enforcement was required by the FAA. *Id.* at 206, 623 N.Y.S.2d at 807, 647 N.E.2d at 1315.

Accordingly, respondent respectfully submits that the issue presented on this appeal, which is primarily one of contract construction under state law principles, does

not involve a substantial federal question and therefore does not invoke the jurisdiction of this Court.

IV. THE COURT OF APPEALS' CONSTRUCTION OF THE AGREEMENT WAS CORRECT

Even if this Court could review the 1995 New York Court of Appeals' determination that the agreement requires application of New York law allowing judicial determination of limitations defenses, the same result would obtain. Specifically, with respect to contractual choice of law clauses, the New York Court of Appeals has held, prior to its decision herein, that "the parties' manifested intentions to have an agreement governed by the law of a particular jurisdiction are honored . . . it is as though the law of the selected jurisdiction were *incorporated into the agreement by reference.*" *Freedman v. Chemical Constr. Corp.*, 43 N.Y.2d 260, 265 n.*, 401 N.Y.S.2d 176, 179-80 n.*, 372 N.E.2d 12, 15 n.* (1977) (emphasis added) (citing Restatement (Second) of Conflict of Laws § 187); *cf.* N.Y. Gen. Oblig. L. § 5-1401. Accordingly, the New York Court of Appeals here was correct in determining that "under this agreement the parties agreed to refer questions of timeliness to the courts by *incorporating* New York law." *Luckie*, 85 N.Y.2d. at 202, 623 N.Y.S.2d at 805, 647 N.E.2d at 1313 (emphasis added). Thus, under New York law, no ambiguity can be found to exist here.

Moreover, there is no reason to distinguish an arbitration provision from any other provision in a contract; as the New York Court of Appeals properly held, as a matter of New York law, the arbitration clause -- "*like all other provisions in the contract* -- was subject to the

parties' additional qualification that New York State law provides the basis of decision for questions concerning . . . its enforcement." *Id.* (emphasis added).

Similarly, the agreement must be construed as a whole -- there is no room here to interpret the choice of New York law to include only the "substantive" rules New York courts would apply *unrelated to arbitration*. Logically, a choice of law clause in an *arbitration* agreement must require application of New York *arbitration* law. *See Slatt v. Slatt*, 64 N.Y.2d 966, 967, 488 N.Y.S.2d 645, 646, 477 N.E.2d 1099, 1100 (in construing contracts, "effect must be given to the [parties'] intent as indicated by the language used"), *rearg. denied*, 65 N.Y.2d 785, 492 N.Y.S.2d 1026, 482 N.E.2d 568 (1985). Otherwise, *the choice of law clause would have absolutely no meaning with respect to the enforcement of the arbitration provision*, which the agreement clearly requires. Indeed, such a determination would violate the settled principle of contract construction that a contract should be interpreted to give effect to *all* of its provisions. *Weiss v. Weiss*, 52 N.Y.2d 170, 174, 436 N.Y.S.2d 862, 864, 418 N.E.2d 377, 379 (1981). Accordingly, under the plain meaning of the agreement, the New York Court of Appeals correctly held that under New York law -- the law the New York Court of Appeals is charged with developing and interpreting -- New York arbitration law must govern.

In addition, because this case involves statutes of limitations, not punitive damages, this case does not implicate the concern expressed by the Court in *Mastrobuono* that the arbitration claimant unwittingly waived a right to relief that would be available under

"New York law" in a non-arbitral context. In fact, the Court found the *Mastrobuono* agreement ambiguous, in part, because New York law allowed punitive damages in court, but not in arbitration, and the agreement contained no such distinction on its face. *Mastrobuono*, 514 U.S. at 59-60.

Here, however, there is no such potential ambiguity -- New York law, like every other state's law, limits the time within which claims may be brought pursuant to express statutory limitations periods, *and these rules are applicable in both forums*. Thus, New York's statutory arbitration law (CPLR 7501-14), which affords arbitration respondents the option of having courts rather than arbitrators determine statute of limitations defenses, does not preclude arbitral determination of limitations defenses if a respondent chooses not to seek such a judicial determination, nor does it amount to a waiver of the right to seek a remedy that is otherwise available in Court without explicitly stating so; it merely authorizes judicial determination of these threshold procedural defenses.

Thus, under ordinary rules of contract interpretation, as applied by the New York Court of Appeals, no "ambiguity" arises; the New York statutory provision allowing judicial determination of limitations defenses must therefore apply to the enforcement of the arbitration agreement pursuant to the clear and unambiguous choice of law clause therein.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that petition should be denied.

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August 21, 1998

Respectfully submitted,

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